DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-184
Title: Carolyn M. Kloeckner, Petitioner
v.
Hilda L. Solis, Secretary of Labor
Docketed: August 15, 2011
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (10-2048)
Decision Date: May 13, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 11 2011	Petition for a writ of certiorari filed. (Response due September 14, 2011)
Aug 31 2011	Order extending time to file response to petition to and including October 14, 2011.
Oct 12 2011	Order further extending time to file response to petition to and including November 14, 2011.
Nov 10 2011	Order further extending time to file response to petition to and including December 14, 2011.
Dec 14 2011	Brief of respondent Hilda L. Solis, Secretary of Labor in opposition filed.
Dec 28 2011	DISTRIBUTED for Conference of January 13, 2012.
Dec 28 2011	Reply of petitioner Carolyn M. Kloeckner filed. (Distributed)
Jan 13 2012	Petition GRANTED.
Feb 24 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including March 28, 2012.
Feb 24 2012	The time to file respondent's brief on the merits is extended to and including May 30, 2012.
Mar 28 2012	Joint appendix filed. (Statement of costs filed)
Mar 28 2012	Brief of petitioner Carolyn M. Kloeckner filed.
May 7 2012	The time to file respondent's brief on the merits is further extended to and including July 13, 2012.
Jul 13 2012	Brief of respondent Hilda L. Solis, Secretary of Labor filed.
Jul 23 2012	SET FOR ARGUMENT ON Tuesday, October 2, 2012
Jul 24 2012	CIRCULATED.
Jul 31 2012	Record received from U.S.C.A. for 8th Circuit. (1 envelope)
Aug 13 2012	Reply of respondent Hilda L. Solis, Secretary of Labor filed. (Distributed)
Aug 23 2012	Record from U.S.D.C. for Eastern District of Missouri is electronic.
Oct 2 2012	Argued. For petitioner: Eric Schnapper, Seattle, Wash. For respondent: Sarah E.

PETITION FOR WRIT OF CERTIORARI

SUPREME COURT, U.S.
FILED
AUG 11 2011
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No. 11-184

In The Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is:

> If the MSPB decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?

PARTIES

The parties are listed in the caption.

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Petitioner Carolyn M. Kloeckner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 13, 2011.

OPINIONS BELOW

The May 13, 2011 opinion of the Court of Appeals, which is reported at 639 F.3d 834 (8th Cir. 2011), is set out at pp. 1a-10a of the Appendix. The February 28, 2010 order of the District Court, which is unofficially reported at 2010 WL 582590 (E.D.Mo.), is set out at pp. 11a-22a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on May 13, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsection (a) of section 7702 of 5 U.S.C. provides in pertinent part:

> (a)(1) Notwithstanding any other provision of law, ... in the case of any employee or applicant for employment who –
>
> > (A) has been affected by an action which the employee or applicant may

> appeal to the Merit Systems Protection Board, and
>
> (B) alleges that a basis for the action was discrimination prohibited by –
>
> (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), [or]
>
> * * *
>
> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (20 U.S.C. 631, 633a),
>
> * * *
>
> the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and section.
>
> * * *
>
> (3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of
>
> (A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section....

Subsection (e)(1) of section 7702 of 5 U.S.C. provides in pertinent part:

> (e)(1) Notwithstanding any other provision of law, if at any time after –
>
> * * *
>
> (B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section),
>
> * * *
>
> an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), [or] section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c))....

Subsection (a)(1) of section 7703 of 5 U.S.C. provides:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

Subsection (b) of section 7703 of 5 U.S.C. provides in pertinent part:

> (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be

> filed in the United States Court of Appeals for the Federal Circuit....
>
> (b)(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), [and] section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c), ... as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

Section 1295(a) of 28 U.S.C. provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –
>
> * * *
>
> (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5....

STATEMENT OF THE CASE

The Statutory Scheme

The Civil Service Reform Act of 1978 ("CSRA") establishes a number of administrative remedies for

federal employees, including in certain circumstances a right to appeal a disputed action to the Merit Systems Protection Board. Employees aggrieved by the final action of the MSPB may seek judicial relief in the appropriate federal court. When a federal employee seeks judicial relief for a claim of unlawful discrimination, he or she faces a "jurisdictional 'mine field.'" *Donahue v. United States Postal Service*, 2006 WL 859448 at *3 (E.D.Pa.). This case presents the central problem and circuit conflict that has confounded litigants and lower courts alike.

The CSRA establishes a specific administrative scheme for federal employees who assert claims of discrimination violating statutes such as Title VII and the Age Discrimination in Employment Act. Individuals claiming such discrimination are entitled to present their claims to the Equal Employment Opportunity Commission. If an aggrieved employee is dissatisfied with the final action of the EEOC or of the employing agency, he or she can file suit in a district court under the relevant anti-discrimination statute. 5 U.S.C. § 7703(b)(2). In such a civil action the plaintiff is entitled to a trial de novo. 5 U.S.C. § 7703(c).

Under the CSRA a federal employee is also entitled to appeal to the MSPB certain adverse personnel actions[1] by a federal agency, such as a dismissal

[1] See 5 U.S.C. § 7512.

or a demotion. 5 U.S.C. §7513(d).[2] The challenged action will be overturned by the Board if it is not supported by substantial evidence. Following final action by the MSPB, an aggrieved employee may seek review of the Board's action by the Court of Appeals for the Federal Circuit. The Federal Circuit reviews the Board's decision, but does not decide the dispute de novo. 5 U.S.C. § 7703(c).

An employee may invoke both remedial schemes, for example by both appealing a disputed termination under section 7513(d) and alleging in that appeal that the dismissal was the result of unlawful discrimination.[3] Claims that combine both types of challenge are referred to as "mixed cases." Many if not most discrimination claims involve adverse actions that are sufficiently serious to be appealable under section 7513(d), and most employees with such claims invoke both remedial schemes. The procedural rules governing the administrative consideration of mixed cases are complex. Ultimately, however, an employee may seek review of a mixed case by the MSPB.

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[2] Appeals under section 7513(d) are ordinarily referred to an administrative law judge, whose decisions are deemed the decision of the MSPB unless the claimant appeals to the MSPB.

[3] Technically the allegation of discrimination would be an alternative basis for the section 7513(d) appeal. An appellant could prevail either by showing the disputed adverse action lacked a substantial basis, or by demonstrating that that action (although perhaps supported by substantial evidence) was actually the result of unlawful discrimination.

The CSRA, however, establishes two different routes – described above – for judicial review of federal employment actions, one for claims that were before the MSPB as a section 7513(d) appeal and another for claims of unlawful discrimination. A mixed case, by definition, involves both, and it is that situation which has given rise to considerable confusion among lower courts and claimants alike, and has led to the circuit conflict at issue in this case. The interrelated jurisdictional provisions create "a minefield for the unwary." *Alfifi v. United States Dep't of Interior*, 924 F.2d 61, 62 (4th Cir. 1991).

If in addressing a mixed case the MSPB decides the discrimination claim on the merits, the lower courts agree that the court with jurisdiction over the controversy is a district court, as would be true for a discrimination claim that had not been the subject of an MSPB appeal. But the lower courts are sharply divided regarding whether a district court or the Federal Circuit has jurisdiction where the MSPB has rejected the discrimination claim on grounds other than the merits.

The Proceedings Below

(1) Petitioner Kloeckner is a former Senior Investigator for the Employee Benefits Security Administration in St. Louis, Missouri. On June 13, 2005, Kloeckner filed an administrative EEO complaint alleging that the agency had discriminated

against her based on age and sex by subjecting her to a hostile work environment.

On July 18, 2006, while that EEO complaint was pending before the EEOC, the defendant agency issued a decision dismissing[4] Kloeckner. At that point Kloeckner had the option of either immediately appealing that dismissal to the MSPB under section 7513(d), or including a challenge to the termination in her pending EEO proceeding. Kloeckner was required to file any immediate MSPB appeal within 30 days of the date on which the dismissal became final,[5] and on August 18, 2006 Kloeckner's attorney filed such an appeal. On September 10, 2006, counsel for both Kloeckner and the agency itself filed a joint motion to add the dismissal issue to Kloeckner's pending EEOC complaint. Plaintiff's attorney also moved to dismiss the MSPB appeal without prejudice, explaining that plaintiff and the defendant agency were filing the joint motion that would put the termination issue before the EEOC. (App. 2a-4a, 13a-14a). On September 18, 2006, an administrative law judge at the MSPB granted the motion to dismiss the MSPB appeal

> without prejudice to the appellant's right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case;

---

[4] Under the CSRA the term of art for the dismissal of a non-probationary employee is a "removal."

[5] See 5 C.F.R. § 1201.22(b).

> or (B) by January 18, 2007 – whichever occurs first.

(App. 14a). The next day the EEOC granted the joint motion to amend plaintiff's EEO complaint.

The EEOC did not act within the period specified by the administrative judge's order. On about April 17, 2007, the EEOC terminated proceedings regarding Kloeckner's complaint, and referred the matter back to the agency. On October 23, 2007, the agency issued its Final Agency Decision, upholding the decision to dismiss Kloeckner and rejecting her discrimination claims. The Final Agency Decision advised Kloeckner that "you may appeal the matter to the MSPB ... within 30 days of receipt of this decision," or file a civil action in the district court. (App. 15). Kloeckner filed an appeal to the MSPB within that 30 day period.

An MSPB administrative law judge, however, ruled that the November 2007 appeal was untimely.[6] Although the employing agency had not issued its Final Agency Decision until October 2007, the

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[6] The administrative law judge held that Kloeckner was not entitled to rely on the statement of the employing agency that she could appeal to the MSPB.

> Although the final decision on the discrimination claim stated the appellant had 30 days from her receipt of the final decision to file an MSPB appeal, such notice does not alter the deadline set by the initial decision dismissing the applicant's first MSPB appeal.

2008 MSPB LEXIS 1055 at *7.

administrative law judge held that Kloeckner was required to file any appeal regarding her termination no later than January 2007. Accordingly, the administrative law judge dismissed Kloeckner's appeal without reaching the merits of that appeal. (App. 16a).[7]

(2) On May 1, 2008, plaintiff filed a civil complaint in the District Court for the District of Columbia, represented by an attorney in the Washington, D.C. area. The government successfully moved for a change of venue, transferring the case to the federal district court in St. Louis.[8] After that change of venue, the government moved to dismiss the case for lack of jurisdiction.

The central issue presented by the government's motion, and the issue addressed in the decisions below, is whether in a mixed case which the MSPB has decided on procedural grounds – here, timeliness – the court with jurisdiction to resolve the plaintiff's discrimination claim is the Federal Circuit or a federal district court.

---

[7] The administrative law judge's decision advised Kloeckner that "[i]f you are dissatisfied with the Board's final decision, you may file a petition with ... [t]he United States Court of Appeals for the Federal Circuit." 2008 MSPB LEXIS 1055 at *11. Whether that statement was correct, or whether jurisdiction instead was in a district court, is the question presented by this case.

[8] In the District Court for the District of Columbia the government also moved to dismiss the case for lack of jurisdiction. The District of Columbia District Court did not rule on that aspect of the government's motion.

The district court noted that "[t]here appears to be a circuit split regarding the necessity that the MSPB reach a decision on the merits before a federal district court has jurisdiction." (App. 20a at n.6). The district judge noted that the Federal and Eighth Circuits had held that only the Federal Circuit has jurisdiction over such disputes; conversely, the district judge noted, decisions in the Second and Tenth Circuits have concluded that district courts – not the Federal Circuit – are to hear such claims. *Id.* The district court followed an unpublished Eighth Circuit decision which had held that the Federal Circuit alone has jurisdiction over these cases. *Id.* (citing *Brumley v. Levinson*, 1993 WL 128507 (8th Cir.)). Because the

> MSPB decision dismissed plaintiff's appeal as untimely filed, ... [any] appeal of such a threshold issue is properly filed with the Federal Circuit. The Court finds that the MSPB's decision based on the timeliness of plaintiff's appeal did not settle the merits of her discrimination claim, and therefore this Court is without jurisdiction.

(App. 22a).

The Eighth Circuit affirmed. Like the District Court, the Court of Appeals recognized that there is a circuit split on this issue, and it strongly criticized the decision of the Second Circuit. (App. 7a-8a, 10a). The Eighth Circuit candidly conceded that the meaning of the relevant statutes "is far from clear." (App. 9a). It concluded that district courts have jurisdiction

over a mixed case decided by the MSPB only if the MSPB has reached the merits of the employee's discrimination claim. (App. 6a). Thus where, as here, the MSPB has rejected an appeal on procedural grounds, the Eighth Circuit reasoned, "the Federal Circuit ha[s] exclusive jurisdiction to review the MSPB's dismissal." (App. 10a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WIDELY RECOGNIZED CONFLICT REGARDING WHETHER THE FEDERAL CIRCUIT OR DISTRICT COURTS HAVE JURISDICTION OVER CERTAIN "MIXED CASES"

A. The Circuit Courts Are Sharply Divided Regarding Which Federal Court Has Jurisdiction Over A Mixed Case Where the MSPB Did Not Determine The Merits of The Discrimination Claim

There is a sharp and deeply entrenched conflict among the courts of appeals regarding which federal court has jurisdiction over a mixed case where the MSPB did not determine the merits of the discrimination claim. The Sixth, Seventh, Eighth, Ninth, District of Columbia and Federal Circuits have concluded that the Federal Circuit has exclusive jurisdiction over such mixed cases. Conversely the Second and Tenth Circuits hold that these mixed cases should be filed in a district court.

The majority view derives from the decision of the Federal Circuit in *Ballentine v. Merit Systems Protection Board*, 738 F.2d 1244 (Fed. Cir. 1984). The MSPB had dismissed the mixed case discrimination appeal on the ground that it was premature. When Ballentine sought review in the Federal Circuit, the MSPB itself objected, insisting that only a district court could hear Ballentine's claim. 738 F.2d at 1245.[9] The MSPB's position in *Ballentine* appears to have been the opposite of the position taken by the government in later litigation, including the instant case. The Federal Circuit in *Ballentine* held that it had jurisdiction (necessarily exclusive jurisdiction) over Ballentine's appeal.

> When an appeal has been taken to the MSPB, until the discrimination issue and the appealable [adverse] action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703.... [U]ntil the *merits* of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed to this court.... [O]ur exercise of jurisdiction over MSPB decisions until issues touching the merits of a

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[9] 738 F.2d at 1245 ("We now have before us ... the MSPB's motion to transfer this case, for want of jurisdiction to consider any appeal in a discrimination-related case, to an appropriate district court.").

> discrimination are appealed comports with the intent of § 7703(b)(1) and (2)....

738 F.2d at 1246-47 (emphasis in original).

The Eighth Circuit in the instant case expressly adopted the holding in *Ballentine*.

> [U]ntil the merits of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may ... be appealed to [the Federal Circuit].

(App. 6a) (quoting *Ballentine v. MSPB*, 738 F.2d 1244, 1247 (Fed. Cir. 1984)). The Eighth Circuit gave deference to the decision of the Federal Circuit in *Ballentine* because "the Federal Circuit is the court with the greatest experience when determining the intent of Congress as reflected in the CSRA." (App. 10a). The panel also relied on the earlier unpublished Eighth Circuit decision in *Brumley v. Levinson*, 1993 WL 128507 at *1 (8th Cir.) ("petitions to review the Board's final decisions must be filed in the Court of Appeals for the Federal Circuit unless the Board has decided discrimination issue on the merits").

Four other circuits have also followed the Federal Circuit's decision in *Ballentine*. In *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998), the Ninth Circuit endorsed *Ballentine's* holding that the Federal Circuit has "jurisdiction over MSPB decisions until issues touching the merits of a discrimination claim are appealed." 140 F.3d at 1261 (quoting *Ballentine*, 738 F.2d at

1247). In *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), the District of Columbia Circuit held that under *Ballentine* even "Board decisions based on procedural or threshold matters that are related to the merits should ... be reviewable in the Federal Circuit." 158 F.3d at 599 (emphasis omitted). Also relying on *Ballentine*, the Seventh Circuit holds that an employee may not file a complaint in district court if "an MSPB decision ... doesn't resolve the merits of an employee's claim of unlawful discrimination." *McCarthy v. Vilsack*, 322 Fed.Appx. 456, 458 (7th Cir. 2009). Relying in turn on *Sloan*, the Sixth Circuit holds that an MSPB decision dismissing a discrimination claim as frivolous can be reviewed only by the Federal Circuit, reasoning that such a decision by the Board is a determination that the Board lacked jurisdiction. *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001).

In *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1999), on the other hand, the Second Circuit expressly rejected the Federal Circuit's view that a mixed case could be heard in a district court only if the MSPB had reached the merits of the plaintiff's discrimination claim.

> [T]he Federal Circuit has supplied to the CSRA an unwritten substantive limitation. Namely, that in order for an MSPB decision concerning a mixed appeal to be considered "judicially reviewable" by the district courts, the MSPB decision must reach the merits of

> both the appealable action and the discrimination claim. *See Ballentine*....
>
> The CSRA does not express a requirement that the MSPB shall determine the merits of the discrimination claim in order for the decision to be "judicially reviewable." ... There is nothing in ... the CSRA that suggests that judicially reviewable actions under subsection (a)(3) of section 7702 are limited to decisions on the merits, or that a matter becomes a "[c]ase[ ] of discrimination" under subsection (b)(2) of section 7703 only after a merits decision.... [W]hen the MSPB issues an adverse "final decision" or "final order" concerning a "case" under section 7702(a)(1), the "case of discrimination shall be filed" in district court....

160 F.3d at 144-45 (footnote omitted).

The Tenth Circuit followed the holding of *Downey* and also disagreed with the Federal Circuit's construction of the CSRA.

> A decision need not be reached by the MSPB on the merits of the discrimination issue ... for the appeal to constitute a "case of discrimination." ... This court adopts the reasoning in *Downey* and holds that when the MSPB has jurisdiction over an appeal under § 7702(a)(1) but dismisses the appeal on procedural grounds, the federal district court has jurisdiction to review *de novo* the decision of the MSPB.

Harms v. Internal Revenue Service, 321 F.3d 1001, 1008 (10th Cir. 2003).

The Eleventh Circuit assumes that, following an MSPB decision, review of a discrimination claim can only be had in a federal district court.

> [A]ccording to the statutory scheme governing review of MSPB final orders, if a federal employee wants to pursue *any type* of discrimination claim on appeal the employee must file a complaint in a federal district court....

Chappell v. Chao, 388 F.3d 1373, 1375-76 (11th Cir. 2004) (emphasis added).

The conflict is well entrenched. In *Downey* the Second Circuit rejected the government's petition for rehearing en banc. 160 F.3d at 146.[10] In the Federal Circuit the government has emphatically opposed any suggestion that *Ballentine* be reconsidered. Brief for Respondent Merit Systems Protection Board, *Toyama v. Merit Systems Protection Board*, 481 F.3d 1361 (Fed. Cir. 2007), 2006 WL 2952347 at *11 n.7 ("To be clear, the government opposes any request by [appellant] that the panel in this case reconsider the Court's decision in *Ballentine* or order reconsideration en ban[c].")

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[10] The government's Petition for Rehearing and Rehearing En Banc is available at 1998 WL 34309977.

B. The Circuit Conflict Is Well Recognized

The lower courts have long acknowledged this circuit conflict. The Eighth Circuit decision below expressly recognized the conflict at issue.

> For many years, every circuit to consider the issue followed the Federal Circuit's jurisdictional decision in *Ballentine*.... This unanimity ended with the Second Circuit's decision in *Downey v. Runyon*.... The Tenth Circuit followed th[e] reasoning [in *Downey*] in *Harms*....

(App. 7a-8a). The Court of Appeals criticized the Second Circuit's reasoning in *Downey* as based on a "bizarre notion" (App. 7a) and objected that "[t]he analysis in *Downey* ignored ... practical, functional considerations, substituting instead an unpersuasive textual analysis." (App. 10a).

Conversely, the Second Circuit, in rejecting the government's petition for rehearing and rehearing en banc in *Downey*, noted that "[a]s made clear in the panel opinion, we disagree with the *Ballentine* court's interpretation of 5 U.S.C. §§ 7702 and 7703." 160 F.3d at 146. The Tenth Circuit also disapproved of the holding in *Ballentine*.

> The circuits ... are split over whether the Federal Circuit has exclusive jurisdiction over the MSPB's dismissal of appeals filed under § 7702(a)(1) on procedural grounds. *Compare Ballentine ... with Downey*.... In *Downey*, the Court of Appeals for the Second

> Circuit rejected the reasoning in *Ballentine*....

Harms v. Internal Revenue Service, 321 F.3d 1001, 1008 (10th Cir. 2003).

The District Court decision in the instant case noted the "circuit split regarding the necessity that the MSPB reach a decision on the merits before a federal district court has jurisdiction" (App. 20a n.6), contrasting the Eighth Circuit decision in *Brumley* and the Federal Circuit decision in *Ballentine* with the decisions of the Second and Tenth Circuits in *Downey* and *Harms*. *Id.* Another district court noted that "there is a split in the circuits regarding whether the merits of the discrimination claim must be decided by the MSPB before an action may be brought in a district court." *Horn v. United States Department of Army*, 284 F.Supp.2d 1, 8 (D.D.C. 2003); see *id.* at 7 (noting that "*Downey* ... reject[ed] *Ballentine*"). "[T]he Second Circuit has rejected the Federal Circuit's position that an MSPB decision is not a judicially reviewable action if the MSPB dismisses the appeal for lack of jurisdiction. *Downey*.... " *Rendon v. Potter*, 2007 WL 1452932 at *5 (W.D.Tex.). "The Second Circuit [in *Downey*] rejected the Federal Circuit's holding in *Ballentine*.... " *Donahue v. United States Postal Service*, 2006 WL 859448 at *2 n.3 (E.D.Pa.).

> The statutory scheme addressing the scope of Federal Circuit review does not expressly state that a mixed case appeal dismissed for lack of jurisdiction must go to the Federal

> Circuit.... [T]he Federal Circuit has concluded ... that such a matter lies within its exclusive jurisdiction. *Ballentine*.... [A]t least one court has expressed its belief that a plaintiff can proceed directly to the district court pursuant to the express terms of section 7703(b)(2). *See Downey* ... (expressing disagreement with *Ballentine*). This seems to be the minority view, however.

Burrell v. United States Postal Service, 164 F.Supp.2d 805, 810 n.5 (E.D.La. 2001).

The government itself has repeatedly recognized the conflict. In its brief in the court of appeals below, the United States acknowledged that, "[a]s the District Court noted, there is a split on the circuits as to the *Ballentine* standard." Brief for Appellee, No. 10-2048 (8th Cir.), 2010 WL 3315496 at *21 n.4. In its brief in the District Court, the government made the same point.

> Plaintiff's reliance on the Second Circuit's decision in *Downey* ... and the Tenth Circuit's decision in *Harms* ... is misplaced because those decisions take an opposing view to the Federal Circuit in *Ballentine*, which decision the Eighth Circuit has followed. In *Downey*, the Second Circuit decided not to adopt *Ballentine's* holding and ... disagreed with ... *Ballentine* ... In *Harms*, the Tenth Circuit ... likewise refused to follow *Ballentine*.... [I]n contrast to the Second and Tenth circuits, the Eighth Circuit has instead followed and applied *Ballentine*....

Defendant's Reply in Support of Her Motion to Dismiss, or in the Alternative, for Summary Judgment, 5-6.

When the government asked the Second Circuit to grant rehearing en banc in *Downey*, it highlighted this same conflict.

> [T]he panel has gone into conflict with the four other circuits to have addressed this issue.... In conflict with th[e] prior unanimous view of the circuits, the panel here has held that the district court could maintain jurisdiction under the CSRA even though the MSPB had not reached the merits of the discrimination claim.

Petition for Rehearing and for Rehearing En Banc, *Downey v. Henderson*, No. 97-6239 (2d Cir.), 1998 WL 34309977 at *1.

> The panel's decision plainly conflicts with the prior unanimous view of the four circuits to have address this issue. The panel itself noted that its decision could not be reconciled with the Federal Circuit's reasoning in *Ballentine*.

Id. at *8 (footnote omitted); see *id.* at *9 ("the panel's ... analysis conflicts with the otherwise uniform approach of the other circuits"). The government took the same position in the Federal Circuit.

> Decisions from the Second and Tenth Circuits finding that there is no requirement that the Board address the merits of a

> discrimination claim for the underlying appeal to constitute a mixed case reviewable in district court ... contradict this Court's holding in *Ballentine*.

Brief for Respondent Merit Systems Protection Board, *Toyama v. Merit Systems Protection Board*, 481 F.3d 1361 (Fed. Cir. 2007), 2006 WL 2952347 at *10.

II. IT IS IMPORTANT THAT THIS CONFLICT BE DEFINITIVELY RESOLVED

In its rehearing petition in *Downey*, the government rightly observed that this conflict involves "an important aspect of the judicial review scheme of the Civil Service Reform Act." Petition for Rehearing and for Rehearing En Banc, *Downey v. Henderson*, No. 97-6239 (2d Cir.), 1998 WL 34309977 at *1. The United States correctly predicted that a conflict on this question would "confuse federal employees attempting to assert their CSRA and Title VII rights and the district courts addressing these issues." *Id.* at 15. That is precisely what has occurred. See *Donahue v. United States Postal Service*, 2006 WL 859448 at *3 (E.D.Pa.) (noting "the jurisdictional 'mine field' of the discrimination exception to the Federal Circuit's exclusive jurisdiction"); *Burrell v. United States Postal Service*, 164 F.Supp.2d 805, 809-10 ("The unwary plaintiff ... will face dismissal"), 810 ("the unsavvy plaintiff [may be] barred from ... raising [discrimination] claims") (E.D.La. 2001).

Clarity of the law is essential in this regard, because a plaintiff who seeks relief in the wrong court is likely to forfeit his or her claim. If the MSPB decides a mixed case, but does not reach the merits of the discrimination claim, it is critical that the federal employee know how the CSRA will be applied. If, as here, a plaintiff pursues redress in a district court, but the courts follow *Ballentine* and hold that only the Federal Circuit had jurisdiction, the plaintiff will lose any chance to obtain judicial relief. Conversely, if a decision of the MSPB regarding a mixed case is one that *could* be heard in a district court, "an employee waives discrimination claims by appealing to the Federal Circuit after an MSPB ruling on a mixed appeal." *Chappell v. Chao*, 388 F.3d 1373, 1377 (11th Cir. 2004); see *Smith v. Honer*, 846 F.2d 1521, 1523 (D.C. Cir. 1988) (same). "[A] federal employee cannot split a mixed case into discrimination and non-discrimination claims in order to pursue two separate appeals from an MSPB final order." *Chappell v. Chao*, 388 F.3d at 1377.

A federal employee in the First, Third, Fourth, Fifth or Eleventh Circuits cannot know with confidence where to pursue a mixed case in which the MSPB has not reached the merits. There is, moreover, uncertainty as to the scope of the rule in *Ballentine*. Several circuits take the position that an MSPB holding that a claim is frivolous – clearly a decision on the merits – can only be reviewed in the

Federal Circuit because such a holding means the Board has no jurisdiction, a "threshold" issue.[11] The Federal Circuit itself maintains that a decision of the MSPB denying counsel fees to a successful claimant – a decision that by definition occurs only in a case where the MSPB has reached the merits – is subject to review in the Federal Circuit (and, thus, not in a district court.). *Hopkins v. MSPB*, 725 F.2d 1368 (Fed. Cir. 1984).

As one court has noted, a prudent attorney might resort to filing two legal actions.

> We are aware that mixed-case complainants ..., to be absolutely safe, might see fit to file simultaneously in the Federal Circuit and in the district court. Otherwise, if the complainant chooses the wrong judicial forum for reviewing the Board's decision, he may be unable to obtain review because the time for appealing in the correct forum has passed.

Powell v. Department of Defense, 158 F.3d 597, 600 (D.C. Cir. 1998). A definitive resolution of this conflict would remove the incentive for such a precautionary tactic.

Clarification of this issue is particularly important because a substantial portion of the administrative discrimination claims of federal employees are mixed cases. "[A] significant percentage of appeals

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[11] *McCarthy v. Vilsack*, 322 Fed.Appx. at 458-49; *Burzynski v. Cohen*, 264 F.3d at 620-21.

from the MSPB involve allegations of discrimination." *Williams v. Department of the Army*, 715 F.2d 1485, 1497 (Fed. Cir. 1983) (en banc) (Bennett, J., dissenting). Many of the litigants who seek judicial review of MSPB decisions are pro se, and ill-equipped to resolve on their own the complex issues presented in determining which court has jurisdiction to hear their claims.

III. THE DECISION OF THE EIGHTH CIRCUIT IS INCORRECT

The decision in *Ballentine* was based largely on section 7702(a)(1), which requires the MSPB to "decide both the issue of discrimination and the appealable action" within 120 days of the filing of an appeal. The Federal Circuit reasoned that this makes

> clear that the judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action.... " § 7702(a)(1).

738 F.2d at 1246.

This analysis is palpably mistaken. First, if, as the Federal Circuit reasoned, the phrase "decide ... the issue of discrimination" in section 7702(a)(1) means "decide the *merits* of the discrimination claim," the 120-day deadline in section 7702(a)(1) would require the MSPB within that time period to determine the merits of every discrimination claim. That would

preclude the MSPB from declining to reach the merits because, for example, a discrimination claim was untimely, premature, or outside the Board's jurisdiction. Section 7702(a)(1) cannot possibly mean that.

Second, section 7702(a)(1) requires the MSPB to "decide *both* the issue of discrimination and the appealable action." (Emphasis added). If this phrase defined the category of cases which could be brought in district court, a district court would not have jurisdiction over a case in which the MSPB did decide the merits of the plaintiff's discrimination claim, but for some reason did not also reach the merits of the plaintiff's companion section 7513(d) appeal. That surely cannot be what Congress intended.

The statutory provision governing which actions can be maintained in district court is section 7703(b)(2), not the administrative decision deadline in section 7702(a)(1). Section 7703(b)(2) provides that cases are to be "filed under section 717(c) of the Civil Rights Act of 1964 [and] section 15(c) of the Age Discrimination in Employment Act" – i.e., filed in district court – if they are "[c]ases of discrimination subject to the provisions of section 7702," which in turn references Title VII and the Age Discrimination in Employment Act. A lawsuit alleging that a plaintiff was discriminated against on the basis of age or sex is surely a "case[] of discrimination"

without regard to why the MSPB did not award the plaintiff redress.

The rule in *Ballentine* has the uniquely counter-productive effect of deterring federal employees from seeking relief from the MSPB. Under the terms of the CSRA, a federal employee asserting discrimination need not appeal to the MSPB at all, but may file suit once the employing agency itself has made a final decision on his or her claim. Kloeckner was afforded precisely that choice in the instant case. Under *Ballentine* an employee who does appeal to the MSPB runs the risk that, if his or her claim is rejected by the Board on some ground other than the merits, the employee will have judicial recourse only through the limited review in the Federal Circuit, rather than the de novo review in a district court. That risk is all the greater in circuits which hold that an MSPB determination that an employee's discrimination claim is not colorable is a decision regarding jurisdiction, and thus reviewable only by the Federal Circuit. A similar decision by the employing agency, if challenged at once without resort to the MSPB, would be subject to de novo review in district court. In the wake of *Ballentine* and its progeny, a federal employee might prudently choose to forgo appeal to the MSPB and proceed directly to federal district court, thus burdening federal district courts with cases that might have been resolved, or narrowed, had they been presented to and considered by the MSPB.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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United States Court of Appeals,
Eighth Circuit.

Carolyn M. KLOECKNER, Plaintiff-Appellant,

v.

Hilda L. Solis, Secretary of Labor, Defendant-Appellee.

No. 10-2048.

Submitted: Jan. 13, 2011.

Filed: May 13, 2011.

Larry J. Stein, Fairfax, VA, for appellant.

Stephen Sharp Davis, AUSA, St. Louis, MO, for appellee.

Before WOLLMAN, LOKEN, and SMITH, Circuit Judges.

LOKEN, Circuit Judge.

In mid-2005, Carolyn M. Kloeckner ("Kloeckner") left her work as a Senior Investigator for the St. Louis office of the Department of Labor's (DOL) Employee Benefits Security Administration and filed an equal employment opportunity (EEO) complaint alleging hostile work environment and discrimination on account of her sex and age. Nearly three years later, the Secretary of Labor issued a final agency action rejecting Kloeckner's claims of unlawful discrimination. Kloeckner appealed to the Merit Systems Protection Board (MSPB), which dismissed her appeal as untimely. Kloeckner then filed this action in the District of Columbia District Court, which

transferred venue to the Eastern District of Missouri. Kloeckner now appeals the district court's[1] dismissal on the ground that the Court of Appeals for the Federal Circuit had exclusive subject matter jurisdiction.

The appeal requires us to again consider complex statutes governing federal employee complaints of wrongful employment action. The jurisdictional issue arises because Congress in the Civil Service Reform Act of 1978[2] bifurcated judicial review of MSPB decisions. Most petitions for review of final MSPB decisions must be filed in the Federal Circuit, 5 U.S.C. § 7703(b)(1), whose jurisdiction is exclusive, 28 U.S.C. § 1295(a)(9). However, actions seeking review in "[c]ases of discrimination" are filed in an appropriate district court, as provided in federal anti-discrimination statutes. 5 U.S.C. § 7703(b)(2). *See generally Kean v. Stone*, 926 F.2d 276, 282-84 (3d Cir.1991). Reviewing the jurisdictional issue de novo, we affirm.

I.

Kloeckner filed her EEO complaint on June 13, 2005. When DOL charged her with being "absent without leave" from June 13 to July 22, she amended

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[1] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

[2] Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

the complaint to include a charge of retaliation. Kloeckner never returned to work. She was eventually removed from employment (terminated) effective July 21, 2006, with her EEO complaint still pending.

Removal is one of the adverse employment actions that may be appealed to the MSPB. *See* 5 U.S.C. §§ 7512(1), 7513(d). Administratively, when Kloeckner challenged the removal while a prior EEO complaint was pending, her dispute became a "mixed case." *See* 5 U.S.C. § 7702(a)(1)-(2); 29 C.F.R. § 1614.302(a). She had the option of immediately appealing the removal to the MSPB, or amending her EEO complaint to add a removal charge and proceeding initially before the Equal Employment Opportunity Commission (EEOC), which conducts hearings at the request of EEO complainants and issues decisions that are then reviewed by the employing agency which issues a final agency decision. *See* 29 C.F.R. §§ 1614.106(d), .109-110. But she could not pursue both avenues of appeal. 29 C.F.R. § 1614.302(b); *see McAdams v. Reno*, 64 F.3d 1137, 1141-42 (8th Cir.1995).

Kloeckner initially chose to appeal her removal to the MSPB in August 2006. However, one month later, she moved to dismiss the appeal without prejudice. Because she was amending her EEO complaint to add a charge of discriminatory removal, Kloeckner argued that dismissal without prejudice would "avoid the expense of conducting discovery on these matters before both the EEOC and the MSPB." An MSPB administrative judge granted the motion over agency

objection. The Order provided, "This case will not be accepted for refiling after January 18, 2007."

In the EEO proceedings, the removal claim was added to Kloeckner's complaint, and the EEOC scheduled a hearing. Some months later, the EEOC cancelled the hearing on account of Kloeckner's abuse of the discovery process and returned her EEO complaint to DOL for decision. The Secretary's final decision was issued in October 2007, finding that DOL had not discriminated or retaliated against Kloeckner on account of sex or age and upholding her removal.

The Secretary's final decision noted that this was a "mixed case" and advised that Kloeckner could appeal to the MSPB or file a civil action in federal district court, but she could not do both. 5 U.S.C. § 7702(a), (e); 29 C.F.R. §§ 1614.302(d)(1)(ii), .310(a). When she chose to appeal to the MSPB, "she was required to exhaust her claims in that forum before filing a civil action." *McAdams*, 64 F.3d at 1142; *see Ballentine v. MSPB*, 738 F.2d 1244, 1246 (Fed.Cir.1984).

Although filed within thirty days of the Secretary's final decision, Kloeckner's appeal to the MSPB was filed more than ten months after the refiling deadline imposed in the order dismissing her first appeal without prejudice. A different administrative judge dismissed the appeal as an untimely refiling, which became the MSPB's final Order when Kloeckner did not seek further administrative review.

The Order advised Kloeckner that she could appeal by filing a petition with the Federal Circuit. She instead filed this action in district court, alleging that the action "is a timely appeal from the [Secretary's] Final Agency Decision," and that she was a victim of unlawful sex and age discrimination and retaliation.[3]

II.

The jurisdictional issue turns on the meaning of the term "[c]ases of discrimination" in 5 U.S.C. § 7703(b)(2). In *Ballentine*, a federal employee appealed the MSPB's dismissal of his appeal as premature to the Federal Circuit. The MSPB moved to transfer the case to an appropriate district court, arguing lack of Federal Circuit jurisdiction because it was a "mixed case." The Federal Circuit denied the motion and affirmed the MSPB's dismissal on the merits, explaining:

> The disposition of this appeal depends upon when our jurisdiction under [5 U.S.C.] § 7703(b)(1) is precluded by § 7703(b)(2) and § 7702. . . . Section 7702(a)(1) requires that the MSPB "decide both the issue of discrimination and the appealable action" within 120 days. . . . Once a case becomes judicially

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[3] If the district court did have jurisdiction because this is a "case of discrimination" under 5 U.S.C. § 7703(b)(2), it could only review the MSPB's decision to dismiss Kloeckner's appeal as untimely. *See Harms v. IRS*, 321 F.3d 1001, 1010 (10th Cir.), *cert. denied*, 540 U.S. 858, 124 S.Ct. 159, 157 L.Ed.2d 105 (2003).

reviewable, § 7702 and § 7703(b)(2) specify that an action be filed under the appropriate discrimination statute. . . .

. . . [T]he judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action. . . ." § 7702(a)(1). When an appeal has been taken to the MSPB, until the discrimination issue and the appealable action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703. Yet, threshold issues such as the MSPB's own jurisdiction arise continually on appeal to this court, and we have taken jurisdiction over these cases. . . .

The language of § 7703(b)(1) . . . strongly suggests that until the merits of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed to this court. . . . [O]ur exercise of jurisdiction over MSPB decisions until issues touching the merits of a discrimination claim are appealed comports with the intent of § 7703(b)(1) and (2) and also allows the application of a unified body of case law concerning issues like . . . whether

> good cause has been shown for the waiver of a filing deadline.

738 F.2d at 1246-47 (emphasis in original); accord *Franklin v. U.S. Postal Serv.*, 61 Fed.Appx. 686, 687-88 (Fed.Cir.2003) (unpublished).

For many years, every circuit to consider the issue followed the Federal Circuit's jurisdictional decision in *Ballentine*. *See Powell v. Dep't of Def.*, 158 F.3d 597, 598-99 (D.C.Cir.1998); *Sloan v. West*, 140 F.3d 1255, 1261-62 (9th Cir.1998); *Brumley v. Levinson*, 1993 WL 128507, at *1 (8th Cir. April 27, 1993) (unpublished); *Wall v. United States*, 871 F.2d 1540, 1543 (10th Cir.1989), *cert. denied*, 493 U.S. 1019, 110 S.Ct. 717, 107 L.Ed.2d 737 (1990); *Blake v. Dept. of Air Force*, 794 F.2d 170, 172-73 (5th Cir.1986). Our panel opinion in *Brumley* adopted *Ballentine*'s bright-line test dividing district court jurisdiction under § 7703(b)(2) and Federal Circuit jurisdiction under § 7703(b)(1): "petitions to review the [MSPB]'s final decisions must be filed in the Court of Appeals for the Federal Circuit unless the Board has decided discrimination issues on the merits." 1993 WL 128507, at *1 (emphasis added).

This unanimity ended with the Second Circuit's decision in *Downey v. Runyon*, 160 F.3d 139 (2d Cir.1998). Expressly disagreeing with the Federal Circuit's construction of 5 U.S.C. § 7703(b) in *Ballentine*, and seemingly basing its analysis on the bizarre

notion that review by the Federal Circuit is not "judicial review," the court held:

> There is nothing in any of these sections of the CSRA that suggests that judicially reviewable actions under [§ 7702(a)(3)] are limited to decisions on the merits, or that a matter becomes a "[c]ase[ ] of discrimination" under [§ 7703(b)(2)] only after a merits decision. . . . [T]he proper construction is that when the MSPB issues an adverse "final decision" or "final order" concerning a "case" under section 7702(a)(1), the "case of discrimination shall be filed" in district court, as required by Title VII.

160 F.3d at 145. The Tenth Circuit followed this reasoning in *Harms*, despite its prior contrary ruling in *Wall*. These courts construe § 7703(b)(2) as meaning that, "when the MSPB has jurisdiction over an appeal [in a case of discrimination] under § 7702(a)(1) but dismisses the appeal on procedural grounds, the federal district court has jurisdiction to review de novo the decision of the MSPB;" the Federal Circuit "lacks jurisdiction to review" such decisions. *Harms*, 321 F.3d at 1008.[4]

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[4] Two other circuits have recently upheld Federal Circuit jurisdiction in mixed case appeals without addressing the jurisdiction/procedure distinction here at issue. *See McCarthy v. Vilsack*, 322 Fed.Appx. 456, 458-59 (7th Cir.2009) (unpublished), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1048, 175 L.Ed.2d 891 (2010); *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir.2001).

Kloeckner urges that we adopt the reasoning in *Downey* and *Harms*. She then distinguishes the decisions in *Ballentine* and *Brumley* because in those cases the MSPB lacked subject matter jurisdiction over appeals in purported "cases of discrimination," whereas here the MSPB had jurisdiction over Kloeckner's mixed case appeal and dismissed the appeal on the "procedural ground" that it was untimely. Such a ruling would clearly be contrary to our decision in *Brumley* that review of MSPB final decisions lies in the Federal Circuit "unless the Board has decided discrimination issues on the merits." 1993 WL 128507, at *1. Though *Brumley* was a nonbinding unpublished opinion, *see* 8th Cir. R. 32.1A, we conclude that it is persuasive authority and should be followed.

The issue is one of statutory interpretation. If the plain meaning of these statutes provided a clear answer, that would end the matter. But as the conflicting decisions in *Ballentine* and *Downey* make clear, the meaning of "[c]ases of discrimination" in § 7703(b)(2), when read together with the provisions of § 7702(a), is far from clear. In resolving the resulting ambiguity, the Federal Circuit took a functional approach to applying § 7703(b)(2), logically inferring that Congress intended to require the de novo district court review that federal anti-discrimination statutes provide when the MSPB has ruled on the merits of discrimination issues in a "mixed case," but intended that the Federal Circuit provide uniform review of MSPB rulings on procedural, non-merits issues. *See*

Ballentine, 738 F.2d at 1246-48. The analysis in *Downey* ignored these practical, functional considerations, substituting instead an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions between MSPB nonmerits rulings that are "jurisdictional," and those that are merely "procedural." *Cf. Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007).[5]

Bearing in mind that the Federal Circuit is the court with the greatest experience when determining the intent of Congress as reflected in the CSRA, we conclude that *Brumley* correctly followed the Federal Circuit's interpretation of § 7703(b) in *Ballentine*. Therefore, because in this case the MSPB did not reach the merits of Kloeckner's discrimination claims in dismissing her mixed case appeal as untimely, the district court properly ruled that the Federal Circuit had exclusive jurisdiction to review the MSPB's dismissal.

The judgment of the district court is affirmed.

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[5] The MSPB in *Ballentine* dismissed a mixed case appeal for lack of jurisdiction because it was filed too early. The similarity between that dismissal and the dismissal for an untimely late filing in this case is apparent. *See Ballentine*, 738 F.2d at 1248. In the context of federal employee dispute resolution, we find it conceptually difficult to see why one decision is "jurisdictional" and the other is not. *See* 5 U.S.C. § 7701(a) ("Appeals shall be processed in accordance with [MSPB] regulations. . . ."); 5 C.F.R. § 1201.154.

United States District Court,
E.D. Missouri,
Eastern Division

CAROLYN M. KLOECKNER, Plaintiff,

v.

HILDA L. SOLIS, Secretary of Labor, Defendant.

No. 4:09CV804-DJS.

Feb. 18, 2010.

Larry J. Stein, Law Offices of Larry J. Stein, LLC, Fairfax, VA, for Plaintiff.

Christian Alexander Natiello, United States Attorney Office, Washington, DC, Stephen S. Davis, Office of U.S. Attorney, St. Louis, MO, for Defendant.

ORDER

DONALD J. STOHR, District Judge.

Now before the Court is defendant Hilda Solis' motion to dismiss or, in the alternative, motion for summary judgment [Doc. #20]. Plaintiff Carolyn Kloeckner opposes defendant's motion, and defendant has filed a reply brief. Accordingly, this matter is ripe for disposition.

Standard of Review

Defendant moves the Court to dismiss plaintiff's action for lack of subject matter jurisdiction.[1] For a court to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant must successfully challenge the complaint either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir.1993). In a facial challenge to jurisdiction such as this, all factual allegations regarding jurisdiction are presumed true and the motion may only succeed if plaintiff has failed to allege an element necessary for subject matter jurisdiction. *Id.* However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Dismissal for lack of subject matter jurisdiction will not be granted lightly. *Wheeler v. St. Louis SW Ry. Co.*, 90 F.3d 327, 329 (8th Cir.1996).

Generally, the Court must ignore materials that are outside of the pleadings; however, the Court may

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[1] Defendant filed her motion pursuant to Fed.R.Civ.P. 12(b)(1) or, in the alternative, Fed.R.Civ.P. 56. The Court finds that it is capable of considering all of the evidence placed before it as matters of public record or materials necessarily embraced by the pleadings, and therefore will take up defendant's motion to dismiss without converting it to a motion for summary judgment.

consider some materials that are part of the public record or those that are necessarily embraced by the pleadings. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir.1999); *see also* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357, at 299 (1990) (opining that a trial court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint").

Facts

With one exception, which is noted below, the parties agree on the facts to be accepted as true for purposes of this motion. Plaintiff is a former Department of Labor employee who held the position of Senior Investigator for the Employee Benefits Security Administration (the "Agency") in St. Louis, Missouri. Plaintiff held that position beginning in 1996.

Plaintiff filed a formal EEO complaint on June 13, 2005, alleging that defendant discriminated against her based on age and sex by subjecting her to a hostile work environment. On August 18, 2005, plaintiff amended her EEO complaint to include a claim of retaliation. On July 18, 2006, the Agency issued a decision removing plaintiff from employment effective July 21, 2006.

On August 18, 2006, while plaintiff's EEO claims were pending, she, through her attorney, filed an appeal of the July 18, 2006, Agency decision to remove

her from employment with the Merit Systems Protection Board ("MSPB"). The parties then filed a joint motion to add plaintiff's termination as a like and related issue to her EEO complaint. That motion was granted, and on September 10, 2006, plaintiff's attorney moved to dismiss the MSPB appeal without prejudice. In the motion to dismiss, plaintiff's attorney stated:

> Ms. Kloeckner is filing a motion today, with the EEOC, to amend her EEOC complaint to "add claims that are like or related to the original complaint." Ms. Kloeckner's dismissal from the Department of Labor "is like or related to" her original complaint before the EEOC. For purposes of judicial economy, and to avoid the expense of conducting discovery on these matters before both the EEOC and the MSPB, Appellant, respectfully, asks that her MSPB appeal be dismissed, without prejudice, for a period of four months, to allow the discovery phase of her EEOC appeal to proceed.

Doc. #21-4, p. 1. On September 18, 2006, Judge Nina Puglia of the MSPB granted plaintiff's motion to dismiss her appeal without prejudice, stating as follows:

> The appeal is DISMISSED without prejudice to the appellant's right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007 – whichever occurs first. This

> case will not be accepted for refiling after January 18, 2007.

Doc. #21-5, p. 3.

On or around April 17, 2007, the EEOC returned the case to the Agency's Civil Rights Center for issuance of a Final Agency Decision ("FAD"). On October 23, 2007, the Agency issued the FAD, finding that the record did not support a conclusion that plaintiff was discriminated against based on sex or age or that she had been retaliated against for prior EEO activity. The FAD contained the following statement regarding the regulatory avenues for review:

> [Y]ou may appeal the matter to the MSPB (not the EEOC), within 30 days of receipt of this decision. . . . Instead of appealing to the MSPB, you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of this decision.

Doc. #21-3, p. 18 (internal citation omitted). Plaintiff's counsel received the FAD on October 29, 2007. On November 28, 2007, plaintiff filed a second MSPB appeal.[2] Doc. #21-6, p. 1. On February 27, 2008,

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[2] The Court notes that plaintiff disagrees with defendant's characterization of the November 28, 2007, filing as a "refiling" of her MSPB appeal. Plaintiff states that this is an inaccurate characterization of plaintiff's action, and that what she filed on November 28, 2007, was a new appeal from the Agency's October 23, 2007, FAD. Defendant responds by arguing that the characterization of the MSPB appeal does not matter, but rather that plaintiff elected to pursue an appeal (whether new or

(Continued on following page)

MSPB Administrative Judge Howard J. Ansorge ("AJ") issued a written opinion disposing of plaintiff's November 28, 2007, MSPB appeal. The AJ found that plaintiff's second appeal was not different than her first MSPB appeal. Further, he found that when plaintiff's first MSPB appeal was dismissed without prejudice, a clear deadline for refiling her appeal with the MSPB was set forth. The AJ found that plaintiff had failed to file the second appeal before that deadline, and had also failed to show good cause for the "untimely re-filing of her appeal." Doc. #21-6, p. 6. Accordingly, the AJ dismissed plaintiff's MSPB appeal as untimely filed.

Plaintiff filed her civil complaint in federal district court on May 1, 2008. In her complaint, plaintiff states that she filed her November 28, 2007, appeal with the MSPB within thirty days of issuance of the FAD. Plaintiff further notes that the instant complaint was filed within thirty days of issuance of the MSPB's decision dismissing the November 28, 2007, appeal as untimely. Doc. #1, p. 3. Plaintiff states that her action "is a timely appeal from the Final Agency Decision" of her EEO claims of discrimination, which was issued by the Agency on October 23, 2007. Doc. #1, p. 2.

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refiled), with the MSPB after issuance of the FAD instead of filing a civil complaint in a federal district court.

The Court recognizes plaintiff's contention, and also notes that "refiled" is the characterization given by the administrative judge in his February 27, 2008, decision.

Discussion

Defendant maintains that, due to the circumstances present in this case, plaintiff's exclusive means of appeal from the MSPB decision lies with the United States Court of Appeals for the Federal Circuit, and therefore this Court is without jurisdiction. Defendant alternatively argues that, if this Court finds it does have jurisdiction, plaintiff's complaint is untimely and should be dismissed on that basis. Plaintiff opposes defendant's motion, and argues that she is permitted under the EEOC regulations to file this appeal in a federal district court, not as an appeal of the MSPB's decision, but as an appeal of the FAD. Further, plaintiff argues that her complaint is timely, but that if it is found by this Court to be untimely, she should be permitted to maintain her action under the principle of equitable tolling.

Federal employment cases which include both (1) claims of adverse personnel action appealable to the MSPB,[3] and (2) claims of prohibited discrimination[4] are regarded as "mixed" cases.[5] There exists a

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[3] Appealable agency actions include removal, suspension for more than fourteen days, reduction in grade, a reduction in pay, and a furlough of thirty days or less. *See* 5 U.S.C. § 7512.

[4] For instance, discrimination claims brought under Title VII or the ADEA. *See* 5 U.S.C. § 7703.

[5] The Court notes that plaintiff's action is a mixed case, that is, she both challenges her termination, *see* 5 C.F.R. § 1201.3(a)(2), and alleges qualifying discrimination, *see* 29 C.F.R. § 1614.302(a).

comprehensive statutory framework for processing mixed cases by federal employees. *See* 5 U.S.C. §§ 7702, 7703; 5 C.F.R. §§ 1201.151-1201.175; 29 C.F.R. §§ 1614.302-1614.310. Initially, an employee can either file a mixed case complaint with her agency's EEO office, or file a mixed case appeal directly with the MSPB. *See* 5 U.S.C. § 7702; 29 C.F.R. § 1614.302. An employee must choose one option or the other; she cannot do both. *See* 29 C.F.R. § 1614.302(b); *McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir.1995). If an employee who pursues relief through an EEO mixed case complaint receives a final decision from the agency, she may file an appeal with the MSPB. 29 C.F.R. § 1614.302(d)(1)(ii) ("If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB . . . within 30 days of receipt of the agency's final decision."). However, the employee instead "may file a civil discrimination action in federal district court within 30 days . . . but only if no appeal to the MSPB is pursued at that time." *McAdams*, 64 F.3d at 1142; 29 C.F.R. § 1614.310(a) ("An individual who has a complaint processed . . . is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court."). If the employee chooses to file a mixed case appeal with the MSPB, she must exhaust administrative remedies in that forum prior to filing a civil action in federal district court. 5 U.S.C. § 7702(a)(1); *McAdams*, 64 F.3d at 1142 (holding that upon the refiling of her MSPB appeal, "all issues that [plaintiff] had raised in her EEO complaint were

transferred to the MSPB proceeding. Having chosen that option, she was required to exhaust her claims in that forum before filing a civil action"). Nevertheless, federal courts have jurisdiction to review MSPB decisions if exhausted (that is, pursued to conclusion), and an employee adversely affected or aggrieved by a final decision of the MSPB may obtain judicial review of that decision. 5 U.S.C. § 7703(a)(1). The Federal Circuit has exclusive jurisdiction over appeals of MSPB decisions, except that 5 U.S.C. § 7703(b)(2) carves out an exception for discrimination cases, and such cases may be appealed to a federal district court. *See* 5 U.S.C. § 7703(b)(2) ("Cases of discrimination subject to the provisions of section 7702 of [Title 5] shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable."). This is because certain claims of discrimination give federal district courts subject matter jurisdiction over such claims asserted by federal employees when administrative remedies have been exhausted. *See* 42 U.S.C. § 2000e-16(c); 29 U.S.C. § 633a(c); 29 U.S.C. § 216(b); *see also, e.g., Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832-33, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). However, to qualify as a case of discrimination appealable to a federal district court, the MSPB must have resolved the merits of the discrimination claim. That is, "petitions to review the [MSPB's] final decisions must be filed in the Court of Appeals for the Federal Circuit

unless the Board has decided discrimination issues on the merits." *Brumley v. Levinson*, 991 F.2d 801, 801 (8th Cir.1993) (per curiam) (*citing Ballentine v. Merit Sys. Prot. Bd.*, 738 F.2d 1244, 1246-47 (Fed Cir.1984)); *see also Brumley v. Dole*, 1994 WL 846910, at *5 n.4 (E.D. Ark. Oct. 14, 1994). "When an appeal has been taken to the MSPB, until the discrimination issue and the appealable action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703." *Ballentine*, 738 F.2d at 1246 (emphasis added).[6]

In the instant case, once the October 23, 2007, FAD was issued, plaintiff had two choices. She was

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[6] There appears to be a circuit split regarding the necessity that the MSPB reach a decision on the merits before a federal district court has jurisdiction. *See, e.g., Harms v. Internal Revenue Serv.*, 321 F.3d 1001, 1008 (10th Cir.2003) (noting that "[t]he circuits . . . are split over whether the Federal Circuit has exclusive jurisdiction over the MSPB's dismissal of appeals filed under § 7702(a)(1) on procedural grounds," and finding that, in the Tenth Circuit "when the MSPB has jurisdiction over an appeal under § 7702(a)(1) but dismisses the appeal on procedural grounds, the federal district court has jurisdiction to review de novo the decision of the MSPB"); *see also Downey v. Runyon*, 160 F.3d 139, 145 (2d Cir.1998) ("There is nothing in . . . the [Civil Service Reform Act] that suggests that judicially reviewable actions under subsection (a)(3) of section 7702 are limited to decisions on the merits, or that a matter becomes a case of discrimination under subsection (b)(2) of section 7703 only after a merits decision." (alterations omitted)). Plaintiff urges this Court to follow *Downey* and *Harms* rather than *Ballentine*. However, pursuant to *Brumley*, notably its reliance on *Ballentine*, the issue appears decided in the Eighth Circuit.

permitted either to file an appeal with the MSPB or in a federal district court, but not both. Once she chose to file an appeal with the MSPB, she was required to exhaust that appeal prior to filing for federal judicial review. Although federal judicial review of an exhausted MSPB decision is possible, plaintiff's filing of an appeal with the MSPB foreclosed her ability to appeal the FAD directly to this Court.[7] Accordingly, plaintiff's instant complaint is

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[7] In *McAdams*, the Eighth Circuit stated that an employee "may file a civil discrimination action in federal district court within 30 days . . . but only if no appeal to the MSPB is pursued at that time." *McAdams*, 64 F.3d at 1142. Defendant relies on this language to support her argument that plaintiff's choice to file an appeal with the MSPB after issuance of the FAD "precludes her from seeking redress in this Court." Doc. #30, p. 2. The Court herein finds that filing an appeal with the MSPB after issuance of a final agency decision precludes a direct judicial appeal of the final agency decision. Nevertheless, the Court notes that nothing prohibits a timely request for federal judicial review of an exhausted decision of the MSPB, regardless of whether such a decision was subsequent to a final agency decision. *See, e.g., Ruth v. West*, 116 F.3d 480, 480 (8th Cir.1997) (per curium [sic]) (finding that dismissal for failure to exhaust administrative remedies was improper, and noting that the plaintiff had timely pursued administrative remedies with the agency and the MSPB, then filed a petition with the EEOC for review of the MSPB decision, then filed an action in federal district court); *see also Ballentine*, 738 F.2d at 1246 ("The agency decision is immediately judicially reviewable in district court unless the employee appeals the matter to the MSPB. Section 7702(a)(1) requires that the MSPB decide both the issue of discrimination and the appealable action within 120 days of the filing of an appeal. The decision of the MSPB likewise becomes judicially reviewable in district court on the date of its issuance. . . ." (emphasis added) (internal quotations omitted)).

properly characterized as an appeal from the February 27, 2008, MSPB decision. That MSPB decision dismissed plaintiff's appeal as untimely filed, and appeal of such a threshold issue is properly filed with the Federal Circuit. The Court finds that the MSPB's decision based on the timeliness of plaintiff's appeal did not settle the merits of her discrimination claim, and therefore this Court is without jurisdiction. Accordingly, the action must be dismissed without prejudice.

For the above stated reasons,

IT IS HEREBY ORDERED that defendant Hilda Solis' motion to dismiss [Doc. #20] is granted.

OPPOSITION BRIEF

No. 11-184

In the Supreme Court of the United States

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, when a federal employee bases a complaint on an adverse personnel action appealable to the Merit Systems Protection Board (MSPB) and alleges that unlawful discrimination was a basis for the action, she has filed what is known as a "mixed case." The question presented is:

Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over an MSPB decision dismissing a mixed case on threshold procedural grounds without reaching the merits of the employee's civil service or discrimination claims.

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In the Supreme Court of the United States

No. 11-184

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 639 F.3d 834. The opinion of the district court (Pet. App. 11a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2011. The petition for a writ of certiorari was filed on August 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, covered federal employees may appeal adverse personnel actions, including removals, to the Merit Systems Protection Board (MSPB

or Board). 5 U.S.C. 7513(d); see 5 U.S.C. 7512 (enumerating appealable actions).

As a general rule, the United States Court of Appeals for the Federal Circuit has "exclusive jurisdiction" to review a final MSPB order or decision. 28 U.S.C. 1295(a)(9); accord 5 U.S.C. 7703(b)(1). The Federal Circuit's jurisdiction is, however, subject to an exception set forth in 5 U.S.C. 7703(b)(2). See 5 U.S.C. 7703(b)(1). That provision states:

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

5 U.S.C. 7703(b)(2).

b. Section 7702, to which the statutory exception in Section 7703(b)(2) refers, sets forth procedures for the resolution of what are known as "mixed cases": that is, cases in which an employee claims both that she has been subject to an adverse employment action appealable to the MSPB and "that a basis for the action was discrimination" prohibited by Title VII of the Civil Rights Act of 1964 or other specified federal antidiscrimination statutes. 5 U.S.C. 7702(a)(1); see, *e.g.*, *Ballentine* v. *MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984).

Under Section 7702, an employee may initiate a mixed case either by filing a complaint with her employing agency or by filing an appeal with the MSPB. See 5 U.S.C. 7702(a)(1) and (2); see also 5 C.F.R. 1201.154(a). If the employee proceeds to the agency first, she may then appeal the agency's final decision to federal district court or to the MSPB. See 5 U.S.C. 7702(a)(2). If the employee appeals to the MSPB, Section 7702(a)(1) provides that "the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action[.]" The employee may then seek review of "the decision of the Board under [Section 7702(a)(1)]" either by (1) petitioning the Equal Employment Opportunity Commission (EEOC) for review, see 5 U.S.C. 7702(b)(1), or (2) filing a complaint in federal district court, see 5 U.S.C. 7702(a)(3). If the employee does not file a petition with the EEOC, the statute provides that the "decision of the Board under [Section 7702(a)(1)] shall be a judicially reviewable action as of * * * the date of the issuance of the decision." 5 U.S.C. 7702(a)(3)(A). Once the employee receives notice of that "judicially reviewable action" under Section 7702(a)(3)(A), the employee has 30 days to file suit in district court. 5 U.S.C. 7703(b)(2).

2. Petitioner was employed as a Senior Investigator for the Employee Benefits Security Administration of the Department of Labor (DOL) in St. Louis, Missouri. Pet. App. 1a. Beginning in May 2005, petitioner took extended leave for claimed medical reasons. Gov't C.A. Br. 5. On June 13, 2005, petitioner filed an equal employment opportunity (EEO) complaint with the agency, alleging that DOL had discriminated against her on the basis of age and sex by subjecting her to a hostile work environment. Pet. App. 1a-2a, 13a. After petitioner had

used all of her accumulated leave, as well as advanced leave granted to her by the agency, petitioner was permitted to go on leave-without-pay status. When petitioner did not respond to DOL's requests for documentation to support her absence, DOL placed her on absent-without-leave status. Gov't C.A. Br. 6. In response, petitioner in August 2005 added a retaliation claim to her EEO complaint. Pet. App. 3a. Petitioner never returned to work. *Ibid.* The agency terminated petitioner's employment in July 2006. *Ibid.*

In August 2006, while her EEO complaint remained pending before the agency, petitioner filed an appeal of her termination with the MSPB. Pet. App. 3a. One month later, however, petitioner moved to dismiss the MSPB appeal without prejudice because she was adding her claim of discriminatory removal to her already-pending EEO complaint and wished to avoid the expense of conducting discovery before both the EEOC and the MSPB. *Ibid.* In the motion, petitioner's counsel requested that the "'MSPB appeal be dismissed, without prejudice, for a period of four months, to allow the discovery phase of her EEOC appeal to proceed.'" *Id.* at 14a.

On September 18, 2006, an MSPB administrative judge granted petitioner's motion over the agency's objection. Pet. App. 3a. The judge's order provided that petitioner's appeal was dismissed "'without prejudice'" to her "'right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—whichever occurs first.'" *Id.* at 14a. The order further provided that "'[t]his case will not be accepted for refiling after January 18, 2007.'" *Id.* at 14a-15a.

The EEOC scheduled a hearing, but later canceled the hearing due to petitioner's abuse of the discovery process and returned her complaint to the agency for a final decision. Pet. App. 4a. In October 2007, the agency issued a final decision rejecting petitioner's claims of discrimination and retaliation, and upholding the termination of her employment. *Ibid.* The agency's decision noted that petitioner had filed a mixed case and informed her of the available avenues for appeal in such a case: it stated that she could either appeal to the MSPB or file a civil action in federal district court within 30 days, but not both. *Id.* at 4a, 15a.

Petitioner appealed to the MSPB on November 28, 2007—within 30 days of the agency's final decision, but more than ten months after the deadline of January 18, 2007, previously imposed by the MSPB at the request of petitioner's counsel. Pet. App. 4a. On February 27, 2008, an MSPB administrative judge dismissed the appeal as untimely. *Id.* at 4a, 16a. The administrative judge's order became the final decision of the MSPB when petitioner did not seek further administrative review. *Id.* at 4a. The MSPB's final order stated that petitioner could file a petition for review in the Federal Circuit. *Id.* at 5a. Petitioner instead filed the present action in federal district court. *Ibid.*

3. The district court dismissed petitioner's case for lack of jurisdiction. Pet. App. 11a-22a. As an initial matter, the court concluded that petitioner's complaint was properly characterized as an appeal from the MSPB's decision, rather than from the agency's final decision. The court explained that once the agency issued its final decision, petitioner "was permitted either to file an appeal with the MSPB or in federal district court, but not both." *Id.* at 20a-21a. Having chosen to

appeal to the MSPB, petitioner "foreclosed her ability to appeal the [final agency decision] directly to this Court." *Id.* at 21a. Under the CSRA's jurisdictional provisions, the district court concluded, petitioner's appeal of the MSPB's decision was properly filed in the Federal Circuit rather than in federal district court. The court explained that "to qualify as a case of discrimination appealable to a federal district court, the MSPB must have resolved the merits of the discrimination claim." *Id.* at 19a; see *id.* at 19a-20a (citing *Brumley* v. *Levinson*, 991 F.2d 801, 801 (8th Cir. 1993) (unpublished) (per curiam), and *Ballentine*, 738 F.2d at 1246-1247). The court held that in this case, the Federal Circuit had exclusive jurisdiction because the MSPB had not resolved the merits of petitioner's discrimination claims, but instead had dismissed her appeal as untimely. *Id.* at 22a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that the Federal Circuit has held that the "judicially reviewable action by the MSPB which makes an appeal a 'case of discrimination' under § 7703(b)(2) that can be filed in district court is that the MSPB has decided both the issue of discrimination and the appealable action[.]" *Id.* at 6a (quoting *Ballentine*, 738 F.3d at 1246). But "until the merits of a 'mixed' discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed" to the Federal Circuit. *Ibid.* (quoting *Ballentine*, 738 F.2d at 1247).

Agreeing with the Federal Circuit's analysis, the court of appeals held that where, as here, a federal employee seeks review of an MSPB decision dismissing her mixed-case appeal on threshold procedural or jurisdictional grounds without reaching the merits, the Federal

Circuit has exclusive jurisdiction to review the MSPB decision. Pet. App. 7a-10a. The court explained that the Federal Circuit's "functional approach" rests on a "logic[al] infer[ence] that Congress intended to require the de novo district court review that federal anti-discrimination statutes provide when the MSPB has ruled on the merits of discrimination issues in a 'mixed case,' but intended that the Federal Circuit provide uniform review of MSPB rulings on procedural, non-merits issues." *Id.* at 9a.

The court of appeals noted that the Second Circuit had reached a different conclusion in *Downey* v. *Runyon*, 160 F.3d 139 (1998). In *Downey*, the Second Circuit held that "[c]ases of discrimination" reviewable in district court include appeals from final MSPB decisions dismissing mixed cases on procedural grounds. See *id.* at 145; *id.* at 146 (statement respecting denial of rehearing) (distinguishing dismissals on jurisdictional grounds from dismissals on non-jurisdictional procedural grounds). The court of appeals rejected that approach in this case, explaining that *Downey* rested on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions between MSPB non-merits rulings that are 'jurisdictional,' and those that are merely 'procedural.'" Pet. App. 10a.

Because the MSPB in this case had not reached the merits of petitioner's discrimination claims, the court of appeals concluded that the Federal Circuit had exclusive jurisdiction to review the MSPB's ruling that the appeal was untimely. Pet. App. 10a.

ARGUMENT

The MSPB in this case dismissed petitioner's mixed-case appeal on the ground that it was filed more than ten months after the January 18, 2007 refiling deadline that had been imposed at the request of petitioner's counsel. The court of appeals correctly concluded that the Federal Circuit is the proper forum for review of the MSPB's decision on that non-merits, threshold ground of untimeliness. The court's conclusion, which is consistent with the decisions of a majority of courts of appeals to address the issue, does not warrant further review in this case. Although the question presented is the subject of disagreement in the courts of appeals, the scope of the disagreement among the courts of appeals is narrower than petitioner suggests. And even on the view of those courts that have concluded that some MSPB non-merits mixed-case rulings are subject to de novo district court review, petitioner's case, which arises from an untimely MSPB appeal, would nevertheless be subject to dismissal for failure to exhaust administrative remedies. The petition for a writ of certiorari should be denied.

1. Under the CSRA, the Federal Circuit has exclusive jurisdiction to review all MSPB decisions, except "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). Section 7702 governs mixed cases in which an employee "(A) has been affected by an action which [she] may appeal to the Merit Systems Protection Board," *and* "(B) alleges that a basis for the action was discrimination prohibited by" a federal antidiscrimination statute such as Title VII. 5 U.S.C. 7702(a)(1)(A) and (B) (emphasis added). Section 7702 provides that when an employee appeals such a case to the MSPB, "the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and

the appealable action[.]" 5 U.S.C. 7702(a)(1). The employee may then seek review of "[a]ny decision of the Board under [Section 7702(a)(1)]"—that is, the decision on "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1)—in federal district court. 5 U.S.C. 7703(a)(3)(A); see 5 U.S.C. 7702(b)(2). The employee's suit must be filed within 30 days after she receives notice of the "judicially reviewable action under such section 7702." 5 U.S.C. 7703(b)(2).

In this case, however, the MSPB did not decide "the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1), instead dismissing petitioner's appeal on the ground that it was untimely. The court of appeals therefore correctly held that the MSPB's decision was not subject to the exception to the Federal Circuit's exclusive jurisdiction set forth in Section 7703(b)(2). As the Federal Circuit has explained, "it is clear that the judicially reviewable action by the MSPB which makes an appeal a 'case of discrimination' under § 7703(b)(2) that can be filed in district court is that the MSPB has decided 'both the issue of discrimination and the appealable action[.]" *Ballentine* v. *MSPB*, 738 F.2d 1244, 1246 (1984) (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)); see Pet. App. 5a-7a.

Where, as here, the MSPB dismisses a mixed-case appeal on threshold procedural or jurisdictional grounds without reaching the merits of the "issue of discrimination" raised by the employee, 5 U.S.C. 7702(a)(1), the employee "is granted no rights to a trial de novo in a civil action" in district court, *Ballentine*, 738 F.2d at 1246. Rather, under the general rule governing appeals from final MSPB decisions, the Federal Circuit has exclusive jurisdiction to review the MSPB's threshold, non-merits determination. Pet. App. 9a-10a; accord, *e.g.*,

Powell v. *Department of Defense*, 158 F.3d 597, 598-599 (D.C. Cir. 1998); *Sloan* v. *West*, 140 F.3d 1255, 1261-1262 (9th Cir. 1998). That allocation of authority "allows the application of a unified body of case law" concerning matters of MSPB jurisdiction and procedure. *Ballentine*, 738 F.2d at 1247. Conversely, a contrary rule "would result * * * ['Inot only in a waste of time and resources, but also in a lack of uniformity as each of some 94 different federal district courts (with appeals to their respective circuits) proceeds to define the metes and bounds of MSPB jurisdiction.[']" *Ibid.* (citation omitted).

That understanding is reinforced by the provisions in Section 7702 allowing for the employee to seek review in the EEOC of "the decision of the Board under [Section 7702(a)(1)]." 5 U.S.C. 7702(b)(1). The EEOC may issue a decision that "differs from the decision of the Board" on the basis that the Board's decision "constitutes an incorrect interpretation of any provision * * * referred to in" Section 7702(a)(1)(B) or that the Board's "decision involving such provision is not supported by the evidence in the record as a whole." 5 U.S.C. 7702(b)(3)(B). Consequently, a "decision of the Board under [Section 7702(a)(1)]" is one that interprets a provision of federal antidiscrimination law referred to in that provision or that "involv[es] such provision" and applies it to "the evidence in the record." *Ibid.* If the Board does not reach the merits of the discrimination claim in that manner, the Board's decision is not one "under subsection (a)(1)" subject to review in a district court rather than in the Federal Circuit.

Here, the Board did not reach the merits of petitioner's discrimination claim. If petitioner had appealed the MSPB's decision to the Federal Circuit, the only

reviewable question would be whether the MSPB correctly determined that her appeal was untimely. If the Federal Circuit had reversed the MSPB's ruling on timeliness, it presumably would have remanded the case to the MSPB to decide the merits of the discrimination claim and the appealable action. Cf. *Wall* v. *United States*, 871 F.2d 1540, 1543 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990). At that point, if petitioner were dissatisfied with the MSPB's decision on the merits, she could file suit in district court under Section 7703(b)(2).

2. Petitioner contends (Pet. 25-27) that the court of appeals' analysis is incorrect for three reasons. Each of petitioner's contentions lacks merit.

First, petitioner contends (Pet. 25-26) that the court of appeals' reading of the statute would require the MSPB to decide the merits of every discrimination and appealable action claim within the 120-day time limit in Section 7702(a)(1). But contrary to petitioner's contention, the court of appeals' ruling recognizes that the MSPB may not reach the merits where, as here, there is a threshold procedural or jurisdictional defect. In such cases, the Federal Circuit has exclusive jurisdiction to review the MSPB's procedural or jurisdictional ruling. See Pet. App. 9a-10a.

Petitioner also contends (Pet. 26) that, under the court of appeals' reading of the statute, "a district court would not have jurisdiction over a case in which the MSPB did decide the merits of the plaintiff's discrimination claim, but for some reason did not also reach the merits of the plaintiff's companion section 7513(d) appeal." The MSPB is, however, unlikely to separate a discrimination claim from a "companion" appealable action in the manner that petitioner hypothesizes. In a mixed case reviewable by the MSPB, the employee chal-

lenges one or more appealable actions, but contends that "a basis" for the actions was discrimination. 5 U.S.C. 7702(a)(1). If the MSPB declines to review an appealable action on threshold, non-merits grounds, then, as in this case, it presumably will have no occasion to consider the employee's claim that the action was motivated by unlawful discrimination.

Finally, petitioner contends that any "lawsuit alleging that plaintiff was discriminated against on the basis of age or sex is surely a 'case[] of discrimination' without regard to why the MSPB did not award the plaintiff redress." Pet. 26-27 (brackets in original). But Congress did not confer a right to trial de novo in district court in every case in which an employee has alleged discrimination on a prohibited basis. It instead provided for district court jurisdiction over "[c]ases of discrimination subject to the provisions of section 7702," 5 U.S.C. 7703(b)(2), and Section 7702 in turn provides for judicial review of an MSPB decision reaching "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1) and (a)(3). The statutory scheme thus makes clear that "the judicially reviewable action by the MSPB which makes an appeal a 'case of discrimination' under § 7703(b)(2) that can be filed in district court is that the MSPB has decided 'both the issue of discrimination and the appealable action[.]" *Ballentine*, 738 F.2d at 1246 (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)).*

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* Petitioner also expresses concern (Pet. 27) that "[t]he rule in *Ballentine* has the uniquely counterproductive effect" of encouraging employees to bypass the MSPB and proceed directly to district court for review of final agency decisions on their discrimination claims. It is not clear why the allocation of authority to the Federal Circuit to review threshold, non-merits rulings should have any significant effect on employees' incentives to appeal to the MSPB, particularly since Federal

3. As petitioner correctly notes (Pet. 12-17), the courts of appeals have taken different approaches to the question presented, although the scope of the conflict is narrower than petitioner suggests.

a. As the court of appeals in this case observed, "[f]or many years, every circuit to consider the issue followed" the Federal Circuit's decision in *Ballentine*, concluding that the Federal Circuit has jurisdiction to review the MSPB's threshold, non-merits decisions in mixed cases. Pet. App. 7a (citing cases); see *Burzynski* v. *Cohen*, 264 F.3d 611, 620-621 (6th Cir. 2001); *Powell*, 158 F.3d at 598-600; *Sloan*, 140 F.3d at 1261; *Wall*, 871 F.2d at 1543; *Ballentine*, 738 F.2d at 1247; see also Pet. App. 8a (citing *McCarthy* v. *Vilsack*, 322 Fed. Appx. 456, 458-459 (7th Cir. 2009) (unpublished) (per curiam), cert. denied, 130 S. Ct. 1048 (2010)).

b. In *Downey* v. *Runyon*, 160 F.3d 139 (1998), the Second Circuit disagreed with *Ballentine*, concluding that federal district courts have jurisdiction to review an MSPB dismissal on grounds of untimeliness. The *Downey* court reasoned that nothing in the CSRA "suggests that judicially reviewable actions under subsection (a)(3) of section 7702 are limited to decisions on the merits, or that a matter becomes a '[c]ase[] of discrimination' under subsection (b)(2) of section 7703 only after a merits decision." *Id.* at 145. But on rehearing, the court in *Downey* limited the scope of its holding, distinguishing *Powell*, *Sloan*, and *Wall*, *supra*, on the ground that "[t]hose cases involved MSPB appeals that had been dismissed not for untimeliness but because they were beyond the substantive scope of MSPB jurisdiction."

Circuit review need not foreclose further district court review on the merits of the discrimination claim, see p. 11, *supra*.

Downey, 160 F.3d at 146 (statement respecting denial of rehearing). The Second Circuit reasoned that, "[b]y definition, such a matter does not involve 'an action which the employee or applicant may appeal to the [Board],' 5 U.S.C. § 7702(a)(2)(A), and is therefore not a '[c]ase[] of discrimination subject to the provisions of section 7702[.]'" *Ibid.*

In *Harms* v. *IRS*, 321 F.3d 1001 (10th Cir.), cert. denied, 540 U.S. 858 (2003), an MSPB administrative judge had dismissed the plaintiff's appeal without prejudice and ordered him to refile the appeal by July 23, 1997. The plaintiff did not, however, attempt to refile until November 1997, and the MSPB dismissed the appeal as untimely. *Id.* at 1004. Relying on the reasoning of *Downey*, the Tenth Circuit concluded that the district court had jurisdiction to review de novo the decision of the MSPB. *Id.* at 1008. But as in *Downey*, the Tenth Circuit distinguished its earlier decision in *Wall* on the ground that *Wall* had involved a jurisdictional ruling. *Ibid.* ("[W]hen the MSPB decides that it lacks jurisdiction over an appeal because the employment action is not within the MSPB's designated appellate jurisdiction, the appeal is not a 'case of discrimination' under § 7702(a)(1).") And ultimately the discussion proved immaterial to the court's judgment: the court in the end ruled in favor of the government, holding that the plaintiff's case was properly dismissed because his untimely appeal to the MSPB constituted a failure to exhaust his administrative remedies. *Id.* at 1009-1010.

c. The reasoning in *Downey* and *Harms* is flawed in important respects. First, the opinions in those cases overlook the fact that Section 7702(a)(3) does not provide for district court review of *any* MSPB decision in a case involving allegations of discrimination, but rather

a "decision of the Board under [Section 7702(a)(1)]." 5 U.S.C. 7702(a)(3). As noted above, a decision under Section 7702(a)(1) is a decision on "both the issue of discrimination and the appealable action." See pp. 8-9, *supra*. When the Board does not decide the issue of discrimination and the appealable action, there is no judicially reviewable action under Section 7702(a)(3), and thus no action subject to the special jurisdictional rule of Section 7703(b)(2).

Moreover, as the court of appeals in this case noted, *Downey*'s distinction between procedural MSPB dismissals (reviewable in district court) and jurisdictional MSPB dismissals (reviewable only in the Federal Circuit) is "difficult and unpredictable." Pet. App. 10a. The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). *Downey*, 160 F.3d at 146 (statement respecting denial of rehearing). But that description applies equally to an appeal, like this one, that is not timely filed. See *Stahl* v. *MSPB*, 83 F.3d 409, 412-413 (Fed. Cir. 1996) (employee's untimely assertion that removal from service was based on discrimination was not appealable to the MSPB under Section 7702(a)); see also Pet. App. 10a n.5. Moreover, as a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, *Downey*'s approach could allow employees with

jurisdictionally deficient CSRA claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

d. In any event, some 12 years after *Downey* was decided, the disagreement among the courts of appeals about the appropriate forum for review of MSPB mixed-case decisions remains narrow and limited to cases in which the MSPB has dismissed a mixed case on non-jurisdictional procedural grounds.

4. Even if that narrow conflict might otherwise warrant this Court's intervention in an appropriate case, this would not be a suitable vehicle. As in *Harms*, *supra*, petitioner's case would be subject to dismissal in any event because she failed to exhaust her administrative remedies.

Petitioner, who was represented by counsel in the administrative proceedings, initially filed an appeal with the MSPB in August 2006, but moved to dismiss that appeal without prejudice because she was adding her claim of discriminatory removal to her already-pending EEO complaint. Pet. App. 3a. In the motion, petitioner's counsel specifically requested that petitioner's "'MSPB appeal be dismissed, without prejudice, *for a period of four months*, to allow the discovery phase of her EEOC appeal to proceed.'" *Id.* at 14a (emphasis added).

On September 18, 2006, an MSPB administrative judge granted petitioner's motion. Pet. App. 14a. The MSPB issued an order stating that petitioner's appeal was dismissed "'without prejudice'" to her "'right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—whichever occurs first.'" *Ibid.* The order reiterated that "'[t]his case will not be accepted for refiling

after January 18, 2007.'" *Id.* at 14a-15a. The MSPB thus granted petitioner the very relief that she requested—*i.e.*, that her appeal be dismissed without prejudice for four months.

Petitioner thus was on clear notice that if she wanted to proceed before the MSPB, she needed to refile her appeal by January 18, 2007. Petitioner did not file her MSPB appeal by the January 2007 deadline, however. Therefore, as in *Harms*, she failed to exhaust her administrative remedies. See *Harms*, 321 F.3d at 1009-1010.

Nor can petitioner assert that the district court has jurisdiction to review the agency's final decision, which was issued on October 23, 2007, and received by petitioner's counsel on October 29, 2007. Pet. App. 15a; see Gov't C.A. Br. 24-27. The agency advised petitioner that she could either appeal to the MSPB or file a civil action in federal district court within 30 days, but not both. Pet. App. 4a, 15a. Petitioner chose to appeal to the MSPB rather than district court, despite the fact that she was on clear notice that the deadline for appeal to the MSPB was January 18, 2007. Having chosen to appeal to the MSPB rather than directly to the district court, she was required to exhaust her administrative remedies. See *id.* at 21a. And in view of the fact that petitioner was assisted by counsel throughout the administrative proceedings and had ample opportunity to seek timely review from either the MSPB or the district court, there should be no basis for tolling the deadline. For those reasons, review of the question presented would not alter the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2011

REPLY BRIEF

No. 11-184

In The Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. This Case Presents an Important and Acknowledged Circuit Conflict

The government candidly acknowledges that "the question presented is the subject of disagreement in the courts of appeals." (Br.Opp. 8; see Br.Opp. 13 ("the courts of appeals have taken different approaches to the question presented"), 16 (noting "the disagreement among the courts of appeals")).[1] The Court previously has recognized that the question of whether an MSPB decision is to be appealed to a district court or, alternatively, to the Federal Court is a matter of "substantial importance." *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 771 (1985).

The government suggests that the importance of this circuit conflict may be reduced because although the Second and Tenth Circuits have held that district courts have jurisdiction to hear mixed cases rejected by the MSPB on procedural grounds (like this case), those circuits have also ruled that only the Federal Circuit can hear a mixed case dismissed by the MSPB on jurisdictional grounds. (Br.Opp. 13-14). But dismissals by the Board on non-jurisdictional procedural grounds are more common, and it is precisely

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[1] See Br.Opp. 7 ("The court of appeals noted that the Second Circuit had reached a different conclusion in *Downey v. Runyon*, 160 F.3d 139 (1998)"; "The court of appeals rejected [the Second Circuit's] approach"), 8 ("The court's conclusion ... is consistent with the decisions of a majority of courts of appeals to address this issue"), 13 ("In *Downey* ... the Second Circuit disagreed with *Ballentine* [*v. MSPB*, 738 F.2d 1244 (Fed.Cir. 1984)]").

disputes about MSPB procedure that the government itself insists ought to be heard only in the Federal Circuit.

The government acknowledges that the significance of this distinction is far from clear, because determining whether an MSPB ruling was procedural or jurisdictional can be "difficult and unpredictable." Br.Opp. 15; see also *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1243 (2010) (noting that the distinction between jurisdictional conditions and procedural claim-processing rules can be "confusing"). For example, if the MSPB concluded that a claimant had failed to establish a prima facie case of discrimination, the Board and the Federal Circuit would apparently regard that failure as meaning the Board had no jurisdiction over the claim. See *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001); *Hill v. Dep't of the Air Force*, 796 F.2d 1468, 1471 (majority opinion), 1472-73 (Newman, J. concurring) (Fed. Cir. 1986).

A number of the leading cases regarding federal court jurisdiction over mixed claims involved cases in which the MSPB had rejected an appeal on procedural, non-jurisdictional grounds. The Solicitor General does not suggest that mixed cases involving disputes about the Board's jurisdiction are common. The government correctly recognizes that disputes about the timeliness of appeals to the MSPB are not jurisdictional. (Br.Opp. 13-14). The deadlines for such appeals are established by the MSPB regulations, and are claim-processing rules rather than jurisdictional limitations. See 5 C.F.R. § 1201.22(b). The MSPB has

no authority to adopt regulations limiting the jurisdiction created by statute. See *Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs*, 130 S.Ct. 584, 597 (2009) ("Congress gave the [National Railroad Adjustment] Board no authority to adopt rules of constitutional dimension."); see 5 U.S.C. § 1204(h).

The government notes that the Second Circuit in *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1998), held only that district courts could hear mixed cases dismissed by the MSPB on non-jurisdictional grounds. (Br.Opp. 13). Yet despite exclusion of MSPB jurisdictional dismissals from the holding in *Downey*, the United States in *Downey* filed (and the Solicitor General authorized) a petition for rehearing en banc, persuasively arguing that the panel's decision was a matter of considerable public importance. (Pet. 22). That issue remains as important today as it was when the government sought rehearing in *Downey*.

The United States defends the rule in *Ballentine* on the ground that there is a pressing need for a "unified" body of law "concerning matters of MSPB ... procedure." (Br.Opp. 10). If the lower courts failed to follow the decision in *Ballentine*, the government warns, there would be "a waste of time and resources" as well as "a lack of uniformity" among the district courts. (Br.Opp. 10) (*quoting Ballentine*, 738 F.2d at 1247). The assertedly mistaken decision in *Downey*, the Solicitor General contends, "could allow employees with jurisdictionally deficient CSRA claims to proceed to district court by filing an untimely MSPB appeal." (Br.Opp. 15-16). The government's own arguments

regarding the merits of the question presented are persuasive evidence of its importance.

The circuit conflict poses an administrative problem for the Federal Circuit, which attempts to provide guidance to pro se litigants regarding whether a challenge to an MSPB decision should be filed in that circuit or in a district court. When the MSPB has decided a mixed case on grounds other than the merits, the correct court in which a pro se litigant should proceed currently depends on the governing law of the circuit where the litigant works or worked. The Federal Circuit's "Guide for Pro Se Petitioners and Appellants" contains the following explanation:

> This court does not have jurisdiction to review cases involving bona fide claims of discrimination ... that were raised before and considered by the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon them forever, you must proceed in a district court (which will hear all your claims, both discrimination and nondiscrimination) or before the Equal Employment Opportunity Commission (which will hear your discrimination claims only). You may waive your discrimination claims on the ... form sent to you by the clerk. If you fail to complete and return the form within

> *14 days* after the date of docketing, the clerk will dismiss your petition.[2]

A litigant in a case such as this would reasonably conclude from this explanation that he or she should sue in district court, which is the right answer in two circuits, the wrong answer in five circuits, and an answer of unknown correctness in five other circuits.

The Federal Circuit's mandatory Form 10,[3] entitled "Statement Concerning Discrimination," requires litigants to check one of several statements, the first two of which are "[n]o claim of discrimination ... has been or will be made in this case" and "[a]ny claim of discrimination ... has been abandoned and will not be raised or continued in this or any other court." The form also offers the option of checking "[t]he petition seeks review only of the Board's dismissal of the case for lack of jurisdiction or for untimeliness," but with no specific explanation of how that alternative relates to the others. The Federal Circuit's Guide and Form 10 illustrate the intractable practical problems created by *Ballentine* and the conflict of which it is a part. See *Otiji v. Heyman*, 47 F.Supp.2d 6, 6 (D.D.C. 1998) (dismissing discrimination action because plaintiff had signed Form 10).

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[2] http://www.cafc.uscourts.gov/images/stories/rules-of-practice/pro%20se.pdf (visited December 26, 2011). The quoted material is at p. 167 (emphasis in original).

[3] http://www.cafc.uscourts.gov/images/stories/rules-of-practice/forms/form10.pdf (visited December 26, 2011).

II. The Decision of the Court of Appeals Is Incorrect

The government's proffered justifications for the decision of the Eighth Circuit illustrate the unsoundness of that decision and of the opinion in *Ballentine* on which it was based.

The class of discrimination claims that can be filed in federal court is delineated in section 7703(b)(2). The government argues that a case is covered by section 7703(b)(2) only if the MSPB has decided the merits of the discrimination claim:

> [T]he judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action[.]"

(Br.Opp. 9) (quoting *Ballentine*, 738 F.2d at 1246 (quoting 5 U.S.C. §§ 7702(a)(1) and 7703(b)(2))). But section 7703(b)(2) does not define the cases to be filed in district court by reference to the section 7702(a)(1) requirement that the Board in mixed cases must decide within 120 days "both the issue of discrimination and the appealable action." Rather, section 7703(b)(2) provides that actions are to be filed in district court if they are "[c]ases of discrimination *subject to* the provisions of section 7702." (Emphasis added). A case is "subject to" the various requirements of section 7702 so long as it both involves otherwise appealable adverse actions (§ 7702(a)(1)(A)) and "*alleges* that a

basis of the action was discrimination prohibited by [certain listed statutes]." (5 U.S.C. § 7702(a)(1)(B) (emphasis added)). A mixed case containing such allegations is "subject to" section 7702 regardless of how the MSPB resolves it. The provision of section 7702(a)(1) directing the Board to "decide both the issue of discrimination and the appealable action" does not delineate the cases "subject to ... section 7702." Rather, that clause sets out one of the statutory directives applicable to the cases that are delineated in sections 7702(a)(1)(A) and 7702(a)(1)(B) and that thus are "subject to" the various commands of section 7702.

"There is nothing in any of [the relevant] sections of the CSRA that suggests that ... a matter becomes a 'case of discrimination' under subsection (b)(2) of section 7703 only *after* a merits decision." *Downey*, 160 F.3d at 145 (emphasis added). It would make no sense to say that a claim is a "case[ ] of discrimination subject to the provisions of section 7702" only if (and thus after) the MSPB has decided it on the merits. The very purpose of section 7702(a) is to regulate how and when the Board is to address an appeal that "alleg[es]" discrimination.

The government also relies on section 7702(a)(3)(A):

> [An] employee may ... seek review of "[a]ny decision of the Board under [Section 7702(a)(1)]" – that is, the decision on "both

> the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1) – in federal district court. 5 U.S.C. 7703(a)(3)(A)[sic].[4]

(Br.Opp. 9). But section 7702(a)(3) does not delineate which cases are to be heard in district court; rather, section 7702(a)(3) designates the point in time *when* a Board decision is reviewable, and contains no provision regarding which court is to review the Board's action. Section 7702(a)(3) clearly does not mean that a decision of the Board in a mixed case is only judicially reviewable if it resolved on the merits both the issue of discrimination and the appealable action; were that the case it would bar review by any court, including the Federal Circuit, of an MSPB decision rejecting an appeal on purely procedural grounds. To the contrary, section 7702(a)(3) controls the time at which judicial review is authorized for "[a]ny decision of the Board," and applies equally to MSPB decisions in mixed cases that are reviewable by any court. As the government has repeatedly pointed out, most recently in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011), "the word 'any' has an 'expansive meaning.'" (Brief for the United States as Amicus Curiae Supporting Petitioner, p. 11 (quoting *Republic of Iraq v. Beaty*, 129 S.Ct. 2183,

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[4] The government's brief inadvertently refers to section 7703(a)(3)(A) rather than section 7702(a)(3)(A). There is no such subsection in section 7703.

2189 (2009) (quoting *United States v. Gonzalez*, 520 U.S. 1, 7 (1997))).

Moreover, if as the government contends an MSPB decision that failed to resolve the merits of a discrimination claim were not a "judicially reviewable action" under section 7702(a)(3), then section 7702(e) would authorize a civil action in district court.

> Notwithstanding any other provision of law, if at any time after –
>
> * * *
>
> (b) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action
>
> * * *
>
> an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 ... [or] section 15(c) of the Age Discrimination in Employment Act of 1967.

The interpretation of sections 7702 and 7703 advanced by the government in the instant case is contrary to the position the government took in *Ballentine*. In that case the MSPB had dismissed the petitioner's claim on the ground that it was premature. The government argued that a challenge to the Board's action should be heard in a district court, not in the Federal Circuit:

> This case is governed by 5 U.S.C. §§ 7702 and 7703 which provide that when issues of racial discrimination and reprisal are raised in an action appealable to the Board (a "mixed case"), a petition for judicial review ... may be filed in an appropriate district court.... [A] decision of the Board in a mixed case may be heard only in an appropriate district court.... [E]ven a question of the Board's jurisdiction to hear an attempted mixed case appeal must be addressed by a district court.... [T]he Board's interpretation of [the regulation] regarding the time for filing a petition for appeal with the Board in a mixed case should be addressed by a district court, as this regulation was promulgated pursuant to 5 U.S.C. § 7702.

(Motion to Transfer to District Court, *Ballentine v. Merit Systems Protection Bd.*, No. 84-907 (Fed. Cir.), pp. 1-2) (footnote omitted). The government's original position on this issue was the correct one.

III. This Case Is an Excellent Vehicle for Deciding the Question Presented

This case presents an ideal vehicle for resolving the circuit conflict. The decision of the court of appeals below was based solely on its view that federal district courts lack jurisdiction over a mixed case following an MSPB decision if the MSPB has not determined the merits of the discrimination claim. The MSPB decision in this case was not based on any asserted lack of jurisdiction. Thus had this case been

filed in any district court in the Second or Tenth Circuits, there would, under *Downey* or *Harms v. Internal Revenue Service*, 321 F.3d 1001 (10th Cir. 2003), have been jurisdiction over petitioner's age, gender and retaliation claims. There are no disputed issues of fact relevant to existence of federal jurisdiction.

The government argues that, even if this Court were to grant review and hold that the district court has jurisdiction in this case, the United States on remand would ultimately prevail on other grounds. The brief in opposition predicts[5] that, were this case returned to the lower courts for further proceedings, those courts would eventually conclude that the

---

[5] The government's prediction that it would prevail on exhaustion is wrong. This defense is based principally on *Harms v. Internal Revenue Service*, 321 F.3d 1001 (10th Cir. 2003), a case that is distinguishable from the instant case. *Harms* concerned a claimant who could have refiled his MSPB appeal in August, 1997, but had failed to do so until November of that year. The district court dismissed his claim for failure to exhaust because Harms had not presented "any evidence to justify his delay." 321 F.3d at 1010.

The instant case is distinguishable from *Harms* on at least two grounds. First, in January 2007, when the administrative law judge's filing deadline expired, Kloeckner was still in the process of pursuing discovery before the EEOC. There was not yet an agency decision from which any appeal could have been taken. Second, on October 23, 2007, the agency issued a new Final Decision rejecting Kloeckner's claim. Kloeckner filed a timely appeal within 30 days of that October 2007 decision. Regardless of whether plaintiff in the fall of 2007 had a right to reopen her earlier MSPB appeal regarding the agency's 2006 decision, the applicable regulations clearly permitted a new appeal from the later 2007 agency decision.

complaint should be dismissed because Kloeckner failed to exhaust administrative remedies. The United States thus reasons that "review of the question presented would not alter the outcome of this case." (Br.Opp. 17).

This contention is not an appropriate basis for denying review. The lower courts in the instant case never addressed the government's exhaustion argument. The government's brief in the Eighth Circuit did not even raise this issue.[6] It is often true that where a case has been dismissed on one ground, other issues remain on which the defendant might subsequently prevail. Because federal courts at least ordinarily are obligated to address jurisdictional matters before considering any other issue, it will usually be the case that an appeal regarding the existence of federal jurisdiction will occur in a case in which the defendant has other, unaddressed defenses. That has not been regarded as a reason to deny review. See *Henderson v. Shinseki*, 131 S.Ct. 1197, 1206 (2011) (reversing jurisdictional dismissal and remanding for consideration of whether appellate deadline was subject to equitable tolling).

---

[6] Brief for Appellee, No. 10-2048 (8th Cir.), pp. 12-26.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-184

In The
Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed August 11, 2011
Certiorari Granted January 13, 2012

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion of the United States District Court for the Eastern District of Missouri (Feb. 18, 2010) ..... Pet. App. 11a

Opinion of the United States Court of Appeals for the Eighth Circuit (May 13, 2011) ..... Pet. App. 1a

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI (ST. LOUIS)

CIVIL DOCKET FOR CASE #: 4:09-CV-00804-DJS

Relevant Docket Entries

Date Filed	#	Docket Text
05/01/2008	1	COMPLAINT against ELAINE L. CHAO (Filing fee $ 350, receipt number 4616012085) filed by CAROLYN M. KLOECKNER.
05/15/2009	15	MEMORANDUM ORDER granting Defendant's Motion to Transfer For Improper Venue. ORDERED that the above-captioned case be transferred to the Eastern District of Missouri.
05/26/2009		Case transferred out to the USDC for the Eastern District of Missouri, pursuant to Court Order entered 05/15/09.
07/02/2009	20	First MOTION to Dismiss for Lack of Jurisdiction, or in the alternative, For Summary Judgment by Defendant Elaine Chao.
02/18/2010	32	ORDER OF DISMISSAL – IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Carolyn Kloeckner's complaint is dismissed without prejudice.
04/14/2010	33	NOTICE OF APPEAL by Plaintiff CAROLYN M. KLOECKNER.

[Further Entries Omitted]

THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COURT OF APPEALS DOCKET #: 10-2048

Relevant Docket Entries

Date Filed	**Docket Text**
05/12/2010	Civil case docketed.
01/13/2011	CASE SUBMITTED On the briefs without oral argument (on calendar) before Judges Roger L. Wollman, James B. Loken, Lavenski R. Smith in St. Louis.
05/13/2011	OPINION FILED – THE COURT: ROGER L. WOLLMAN, JAMES B. LOKEN and LAVENSKI R. SMITH. James B. Loken, Authoring Judge (PUBLISHED).
05/13/2011	JUDGMENT FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion.
	[Further Entries Omitted]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

CAROLINE M. KLOECKNER,

Appellant,

v.

DEPARTMENT OF LABOR,

Agency.

DOCKET NUMBER
CH-0752-06-0746-I-1

DATE: September 18, 2006

[Counsel Information Omitted]

BEFORE
Nina Puglia
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant is a Pension Investigator, GS-13, at agency's Employee Benefits Security Administration in Kansas City, Missouri. Effective July 21, 2006, the agency removed her for unauthorized absences and lack of candor.

The appeal is DISMISSED WITHOUT PREJUDICE to the appellant's right to refile at a later date.

DISMISSAL WITHOUT PREJUDICE

The appellant moved to dismiss this appeal without prejudice based on a related discrimination complaint. Under 5 C.F.R. § 1201.154(b)(1) and (2), if an employee first files a formal complaint with the agency, she then must file a Board appeal within 30 days after she receives the agency resolution or final decision on the discrimination issue, or, if the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, she may appeal the matter directly to the Board at any time after the expiration of 120 days. *Gray v. United States Postal Service*, 93 M.S.P.R. 161, 165 (2002). Here, the appellant does not allege she filed a formal discrimination complaint concerning her removal. Thus her Board appeal appears ripe for adjudication.

Instead, the appellant asks the Board to postpone her appeal because she wishes to complete discovery in a matter currently pending before the Equal Employment Opportunity Commission ("EEOC"). According to the appellant, her EEOC case concerns the agency's decision to place her in an AWOL status, allegations of hostile work environment based on sex, and "claims that are like or related to the original complaint." Appeal File, Tab 5. The agency opposes the appellant's motion, arguing the appellant should now elect a forum in which to litigate her removal. *See* Appeal File, Tab 6.

"An administrative judge has broad discretion to control the proceedings before her, and dismissal

without prejudice is a procedural option that is committed to her sound discretion." *Hinton-Morgan v. Department of the Army*, 75 M.S.P.R. 382, 399 (1997); see also *Milner v. Department of Justice*, 87 M.S.P.R. 660 (2001) (dismissal without prejudice to allow for discovery appropriate to avoid lengthy or indefinite continuance). Because the appellant filed a timely Board appeal, seeks a limited period of time in which to obtain evidence of discrimination through discovery, and such a delay will not prejudice the agency, I find the interests of justice will not be served by forcing the parties to hearing at this time.[1]

DECISION

The appeal is DISMISSED without prejudice to the appellant's right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007 – whichever occurs first.[2] This case will not be accepted for refiling after January, 18, 2007. The appellant's refiled appeal must be accompanied by her fully-pled response to the Affirmative Defense Order dated August 28, 2006.

---

[1] Should the EEOC take jurisdiction over the appellant's removal, the agency may renew its motion to dismiss when the appellant refiles her appeal.

[2] Any documents submitted in connection with this appeal should not be resubmitted with the refiled appeal.

FOR THE BOARD:

s/ Nina Puglia
Nina Puglia
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 23, 2006**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition,

with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the

Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

U.S. Department of Labor Filed: OCT. 23, 2007

Office of the Assistant Secretary [SEAL]
for Administration and Management
Washington, D.C. 20210

Caroline M. Kloeckner
Complainant

v.

Elaine Chao,
Secretary
U. S. Department of Labor,
Agency

Agency Case No. CRC 05-07-105

FINAL AGENCY DECISION

Statement of Claim

The Complainant, Caroline Kloeckner, contends that the Employee Benefits Security Administration (EBSA or the "Agency") discriminated against her by subjecting her to a hostile work environment based on sex (female) and age (D.O.B. **/**/1963). She further contends that the ESBA [sic] discriminated against her in reprisal for prior EEO activity (filing an EEO complaint) when, on or around July 27, 2005, she was notified by her District Supervisor that she would be charged with Absent Without Leave (AWOL) status as opposed to Leave Without Pay (LWOP) for the period June 13 – July 22, 2005. Finally, the Complainant contends that on July 18, 2006, she was

dismissed effective July 21, 2006, in reprisal for her prior EEO activity.

Procedural History

The Complainant initially contacted an EEO Counselor on April 25, 2005. (Tab B1). On May 25, 2005, following an unsuccessful effort to resolve the issues raised, the EEO Counselor issued to the Complainant a Notice of Right to File a Discrimination Complaint. (Tab B4). On June 13, 2005, the Complainant filed a formal complaint, alleging that she had been subjected to a hostile work environment based on her sex and age. (Tab A1). The Agency accepted the following issues for investigation:

> Whether the Employee Benefits Security Administration (EBSA) created a hostile work environment for the Complainant based on sex (female) and/or age (D.O.B. **/**/1963) when, beginning around June 2004 and continuing through April 2005:
>
> 1. her management team (Regional Director, Associate Regional Director, and District Supervisor) allegedly stopped processing her cases and 214 time reports and allegedly "conducted hostile, microscopic investigations of every facet of her work life with a very specific agenda" – allegedly to fire her;
>
> 2. the Associate Regional Director allegedly made multiple daily contacts with her supervisor to criticize her and her work;

3. her District Supervisor and Associate Regional Director allegedly directed her to commit fraud on her 214 reports;

4. her management team allegedly scrutinized her work more harshly than her coworkers';

5. her District Supervisor, with support and encouragement from the Regional and Assistant Regional Directors, allegedly yelled at and berated her until she started crying;

6. her management team allegedly treated her with contempt and hostility – unlike male employees and female employees outside of her age group; and,

7. her District Supervisor allegedly informed her that no one else in the office was subjected to the scrutiny and review that she was and that management intended to terminate her.

(Tab C). On August 4, 2005, the Complainant sought to amend her complaint to include an allegation of discrimination based on reprisal for prior EEO activity. On August 18, 2005, the Civil Rights Center ("CRC") amended her complaint to include, as like and related, the following:

8. Whether the EBSA discriminated against the Complainant in reprisal for prior EEO activity (filing an EEO complaint) when, on or around July 27, 2005, she received a letter from her District Supervisor notifying her that she would be charged with AWOL as

opposed to LWOP for the period June 13 – July 22, 2005.

Upon completion of the investigation of the above-referenced complaint, the CRC provided the Complainant with a copy of the Report of Investigation (ROI). On June 20, 2006, the Complainant, through her attorney, requested a hearing before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC).

On June 27, 2006, the Acting Supervisory Administrative Judge of the EEOC's St. Louis District Office ordered the Agency to produce a copy of the complete complaint file. On August 24, 2006, the Administrative Judge acknowledged receipt of the complainant's request for a hearing.

On September 11, 2006, Complainant's attorney and the Agency's representative filed a Joint Motion to Amend Complaint and for Extension of Discovery Deadlines. The Joint Motion requested to amend the Complainant's complaint to include her July 18, 2006 removal from the Agency, effective as of July 21, 2006. On September 19, 2006, the Administrative Judge granted the motion, finding that the Complainant's claim of termination was like or related to the issues in her original complaint. The Administrative Judge accepted the following additional claim:

9. Whether the Complainant was retaliated against based on her prior EEO activity when she was terminated from her position

as Senior Investigator, effective July 21, 2006.[1]

By letter dated November 26, 2006, the Complainant filed a Motion to Amend Complaint to Allege Discrimination on the Basis of Disability. The Complainant contended that the Agency's decision to place her on AWOL status rather than on LWOP, and then to terminate her in July 2006, was also based on discrimination resulting from her work-related depression, stress and anxiety. The Agency objected to the proposed amendment. On December 13, 2006, the Administrative Judge issued an Order Denying Complainant's (Second) Motion to Amend Complaint, holding that 1) the request was untimely given that Complainant's counsel recently amended the complaint, yet failed to include disability as a basis at that time; and 2) the disability/failure to accommodate allegation was not like or related to the Complainant's claim of harassment and retaliation when she was placed on AWOL status and subsequently terminated. The Complainant moved for reconsideration of the denial of her motion to amend the complaint to add allegations regarding disability discrimination, and the Administrative Judge denied the motion for reconsideration on January 17, 2007.

---

[1] The July 18, 2006 Decision on Proposed Removal from the Regional Director notified the Complainant that her termination could be appealed to the Merit Systems Protection Board (MSPB) within 30 days of the termination. She did not do so.

Subsequently, on April 17, 2007, as a sanction for bad-faith pre-hearing conduct by the Complainant not at issue here, the EEOC Administrative Judge cancelled the hearing and returned the case to the CRC for issuance of a Final Agency Decision.[2]

Statement of Facts

The Complainant (female, D.O.B. **/**/1963) was hired in July 1989, and worked for EBSA in St. Louis and in Los Angeles, California, where she was a Group Supervisor. Around November 1996, she transferred from the Los Angeles Regional Office to the St. Louis District Office (SLDO), where she was a Senior Investigator, GS-13. From May 18, 2005 until June 12, 2005, the complainant was on various types of paid leave. From June 13 to July 22, 2005, she was placed on AWOL. Thereafter, she was continuously placed on AWOL until she was terminated effective July 21, 2006. The Complainant's first-line supervisor (S1) was the District Supervisor (male, D.O.B. **/**/1949). Her second-level supervisor (S2) was the Deputy Regional Director (male, D.O.B. **/**/1966);

---

[2] At the time the Complainant's termination was added to the issues for review and determination through the EEO process, the Complainant's case became a mixed case, which requires the issuance of a Final Agency Decision. 29 C.F.R. § 1614.302(a), (d). As a mixed case, the Complainant's case is properly before the CRC for the issuance of a FAD, without regard to the AJ's additional reasons for remanding the case to the CRC.

and her third-level supervisor (S3) was the Regional Director (male, D.O.B. **/**/1948). (Tabs F2, FF3, F7).

Complainant's Allegations

The Complainant alleged that between June 2004 and April 2005, she was subjected to a hostile work environment that included the following incidents of alleged harassment. (Tab C).

Allegation 1 – Management stopped processing her cases and "214" time reports and "conducted hostile, microscopic investigations of every facet of the Complainant's work life with a very specific agenda" – allegedly to fire her.

The Complainant alleges that scrutiny of her "214" time reports began around June or July of 2004, shortly after S2 and S3 took over management of the St. Louis office.[3] (Tab F1, pp. 3-7). She states that it became apparent that she was singled out for close monitoring when S1 and S2 began to scrutinize her "214" time reports, PeopleTime reports, case work, leave records, travel records, and sign-in records, among other things. *Id.* at 7. She maintains that the intense scrutiny of her cases caused her to contact the

[3] EBSA Investigators in the St. Louis office are required daily to record their work time in 15 minute increments. (Tab F1Q, p. 1; Tab F7, p. 2). The forms on which employees record their time are referred to interchangeably in the record as "214s," "EMS 214s," "214 reports," or "214 time reports."

union and the EEO Office for advice, and to initiate medical treatment for work related stress and anxiety in September 2004. *Id.* at 9-11. She states that she submitted one case in July 2004 that was not approved for forwarding until November 2004, due to S1 and S2 critiquing it, criticizing her, and accusing her of charging excessive time on the case. *Id.* at 11-13. The Complainant cites another case that was submitted to Kansas City, where it "sat." *Id.* at 14. When she inquired about its status to S3, he did not respond. *Id.* at 15. She states that a younger female is treated more favorably by S1, even though she is a worse performer than the Complainant. *Id* at 19.

The Complainant states that in January 2005, S2 increased his scrutiny by examining the sign-in book and leave records. *Id.* at 20. During this time period, S2 had the administrative support person send him copies of the sign-in book for the past year along with leave slips she had submitted for the past year. *Id.* The Complainant states that she became fearful, believing she was going to be fired. *Id.* The Complainant states that S2's examination of her leave records was completed on March 18, 2005, but that she never got a report or other feedback. *Id.* at 21. She states that she continued to be questioned regarding her "214" time reports, and that she had to endure management's opinion regarding excessive time charged to "other" activities. *Id.* at 22. She claims that she requested help from S1 regarding proper submission of daily "214" entries, but that he did not help her, and that S2 did not approve them.

Id. at 24-25. She states that the alleged harassment continued until she went on leave on May 18, 2005 as a result of work-related stress and anxiety. *Id.* at 33.

Allegation 2 – S2 allegedly made daily contacts with S1 to criticize the Complainant and her work

The Complainant asserts that in June or July of 2004, S2 began monitoring and scrutinizing her "214" time reports, case files and every facet of her work life. She states that he contacted S1 on a daily basis to ask questions about her daily activities. (Tab F1, p. 7).

Allegation 3 – Directed to commit fraud on "214" Reports

The Complainant alleges that between December 2004 and April 2005, S1 and S2 directed her, through emails, to commit fraud on her "214" reports by changing her time reports to claim less time than she had actually spent on "other" activities. (Tab F1, pp. 22-27).

Allegation 4 – Work Scrutinized More Harshly

The Complainant cites examples already discussed under Allegation 1 above, in which she maintains that she is subjected to a higher level of scrutiny than other employees. (Tab F1, pp. 9, 17-19).

Allegation 5 – S1 with the support and encouragement of S2 and S3 yelled at her and berated the Complainant

The Complainant states that S1 yelled at her and berated her on more occasions than she can enumerate. The Complainant alleges that on July 15, 2004, S1 yelled at the Complainant for 20 minutes for numerous reasons including mistakes in her work and the fact that he believed she had sweat pants on that day. (Tab F1, p. 32).

Allegation 6 – Management treated the Complainant with contempt and hostility

The Complainant provided no new examples, other than those listed above.

Allegation 7 – Management informed her that she was singled out for scrutiny and review and that management intended to terminate her

The Complainant asserts that on March 4, 2005, S1 confirmed that management targeted the Complainant and told her that they intended to terminate her. (Tab F1, p. 14).

Allegation 8 – Charged AWOL for Period covering June 13 through July 22, 2005 in Reprisal for prior EEO Activity

The Complainant states that even though she requested to be placed on leave without pay (LWOP) for

the period covering June 13 through July 22, 2005, she was placed on AWOL in reprisal for her previous EEO activity. (Tab F1, p. 33). The Complainant stated that she received a notice from management via FedEx in July, 2005, that she was being charged AWOL; she was also threatened with termination. The Complainant maintains that during the period of her absences, she was incapacitated because of medical reasons (work related stress and anxiety). (Tab F1, p. 33).

Allegation 9 – Terminated

According to the Complainant, she was terminated on July 18, 2006 in reprisal for prior EEO activity. The Complainant acknowledged that she did not comply with the Agency's policies when requesting leave. Agency Ex. 8 at 1. The Complainant stated that her anxiety disorder was the reason for her lack of responsiveness to the Agency's attempts to have her comply with their applicable procedures for requesting leave. *Id.* She also stated that she did not open letters from the office because she was "too overcome by fear and emotion to open letters from the office." *Id.* at 2.

EBSA's Response

Allegation 1 – Management stopped processing her cases and "214" time reports and "conducted hostile, microscopic investigations of every facet of the Complainant's work life with a very specific agenda" – allegedly to fire her

S1 states that he approved the Complainant's "214" time reports every pay period, but that it was at the Regional Office Level that they were not approved. (Tab F2, p. 2). He asserts that the Complainant's charges to the "other" category were excessive in comparison to other employees in the St. Louis District Office (SLDO). *Id.* at 3. He provided her a copy of a report listing charges to "other" for all investigators-Auditors (I/As), showing she had more charges to "other" than any other I/A in SLDO, 2.3 times the average charged by all the others. *Id.* S1 states further that another reason that her "214" time reports may not have been approved is because she had a record of not entering her time charges timely. *Id.* They are to be completed daily, but the Complainant often did not make entries for a week. *Id.* He asserts that the Complainant also sometimes completed her PeopleTime timesheets two weeks in advance, entering 9:00 a.m. to 5:30 p.m., and then entered the corrected time later. *Id.* at 4.

S2 states that he was responsible for conducting quality reviews of the SLDO and Kansas City Regional Office. (Tab F7, pp. 3-4). In his review of one of the Complainant's cases, he noted that time expended was not commensurate with the issues involved in

the case. *Id.* at 4. He notes that the Complainant, a GS-13 Investigator, should be able to process such a case in much less time. *Id.* He also stated that there were numerous time charges on the case but only minimal activity. *Id.* This was the only case in the 51 cases he reviewed that had excessive time charges. He asserts that the Complainant received a copy of his report through S1. *Id.*

S2 further states that he heard "rumors" in February 2004, that the Complainant came to work late and left the office for extended periods of time during the day without taking leave. *Id.* He also heard rumors that she was working on outside interests while in the office, such as an educational course she was taking, or working on her own business. *Id.* He states that on February 19, 2004, he received a fax from the SLDO regarding an organization unrelated to EBSA business, Peaceful Choices, with the Complainant named as the contact. *Id.* at 4-5.

S2 states that around November 2004, the new Regional Director (S3) discussed with him how to improve the SLDO's performance, particularly the performance of the Complainant and a male employee in the office. *Id.* at 5. S3 asked S2 to monitor the situation, and to monitor steps taken by S1 to improve the performance of the two employees. *Id.* S2 states that his oversight involved looking at SLDO in its totality, not just at the Complainant. *Id.* at 5-6. Also in November 2004, S2 reviewed one of the Complainant's cases, and noted that it had excessive time charges, unsupported monetary recoveries claimed,

and no violations relating to the recoveries in the closing letter. *Id.* at 6.

S2 states that on January 25, 2005, S3 received an OIG complaint regarding the Complainant and another SLDO employee. *Id.* The individual who filed the complaint requested confidentiality and S1 was never advised of the employee's identity. *Id.* S2 asserts that the OIG complaint alleged that S1 gave the Complainant preferential treatment. *Id.* It alleged that the Complainant frequently arrived late, left early, and falsified her sign-in/sign-out times. *Id.* It also alleged that she was absent from work without requesting leave, and might be abusing sick leave. *Id.* Additionally, it alleged that she either did not sign out or only put her cell phone number in the book where investigators are required to sign out when they are in the field. *Id.* The OIG complaint further alleged that she was working on outside interests while in the office, such as educational courses or her own business. *Id.*

As a result of the OIG complaint, S2 began scrutinizing more closely the Complainant's "214" time reports. *Id.* With a closer review, S2 found many irregularities on the reports, and S2's statement goes into great detail about these irregularities. *Id.* at 6-8, 9-11. During this period, S2 reviewed the Complainant's "214" reports from 2004, and found additional irregularities. *Id.* at 8. S2 delayed approval of the Complainant's "214" time reports during the period following the OIG complaint until her departure, or had concerns regarding the "214" reports, for four

reasons, *i.e.*, (1) S3 asked S2 to review the allegations made in the OIG report to determine whether the allegations were correct; (2) During his review of the Complainant's time charges, he found them to be excessive and unsubstantiated; (3) S2 witnessed the Complainant's activities that were not accurately reported on the "214" time reports and PeopleTime Reports; and (4) the Complainant did not fill out her "214" time reports daily and she often changed the time charges multiple times before submitting her "214" time reports. *Id.* at 3, 8. S2 stated that he did not review the Complainant's leave and work record with the intent to terminate the Complainant. *Id.* at 13.

S3 stated that the Complainant's cases were processed the same as other employees in the office. (Tab F3, p. 3). S3 states that when he became Regional Director in June 2004, he began an analysis of the work performed by the office. *Id.* He found that there were performance and administrative issues that needed improvement. *Id.* Discrepancies were noted on the Complainant's "214" Reports and PeopleTime Reports. *Id.* She was advised to ensure that her reports were properly and timely prepared. *Id.* He noted, with respect to case processing, that SLDO investigators took five days longer to complete routine investigations than Kansas City Regional Office investigators did. *Id.* Further, the Complainant and one male employee took significantly longer than others. *Id.* For example, in fiscal year 2004, 28 cases were closed by 6 other SLDO investigators in 15 days

per case. *Id.* The Complainant and a male investigator closed 3 such cases with an average of almost 42 days per case. *Id.* S3 then instructed S1 to address the problem. *Id.* Employees with problems with case processing time and completing "214" time reports receive more attention from their supervisors. *Id.* at 3-4. Since the Complainant and another employee had problems in both areas, their work and reports were carefully reviewed to ensure they were correct and to help these employees make improvements. *Id* at 4.

S3 received an OIG report on January 25, 2005, that alleged that the Complainant received preferential treatment, falsified her time and attendance reports, conducted personal business during work hours, and misused government equipment. *Id.* He considered the allegations to be serious, and met with the Special Agent in Charge and an attorney from the Kansas City Regional Solicitor's Office. *Id.* Both advised that he should conduct an internal investigation to determine whether there was any truth to them. *Id.* He discussed the OIG report with S2, and they developed a plan to review the time and attendance records of employees of the SLDO, and to obtain information regarding the alleged outside employment of the Complainant. *Id.* He requested all sign in/out logs for the SLDO from the GSA building manager for the past 12 months, to be matched against PeopleTime records. *Id.* at 5. Employees enter the SLDO by passing a card over a device that unlocks the door when it recognizes the card, and

records the time anyone enters the space. *Id.* S3 asserts that the review and comparison of the various timekeeping systems revealed numerous discrepancies with regard to the Complainant's time and attendance, which resulted in her either earning credit hours she did not work or saving her leave she should have taken. *Id.* Accordingly, he instructed S1 to carefully review the Complainant's reporting of her time and to have her make adjustments as necessary for an accurate accounting. *Id.* With respect to the male employee, the review revealed that, on a number of occasions, he did not report to work by the beginning of the core hours as required by his flextime agreement *Id.* S3 states that he advised S1 to inform this employee of the requirements and to carefully monitor his time and attendance. *Id.* Based on the excessive processing time of the Complainant and the male, S3 asserts that management had begun to review their time and attendance prior to the OIG complaint. *Id.* These reviews indicated that entries on the "214" Reports were not always supported by evidence of work in the case file. *Id.* at 6. Because of the seriousness of the OIG allegations, management scrutinized the Complainant's "214" reports more carefully, and some of them were not immediately approved. *Id.* As a result of the OIG complaint and resulting investigation, reports for pay periods ending January 22, February 5, February 19, March 5 and March 19, 2005, were not approved until April 1, 2005. *Id.*

S3 states that management discovered that the Complainant formed a Limited Liability Company called Peaceful Choices, LLC, and that an internet search revealed that she is the contact for the Three River Aikido in St. Louis. *Id.* at 7. Further, the Complainant had a relationship with Landmark Education and had taken a number of courses from them. *Id.* She requested sick leave on May 20, 2005 and attended such a course on that date. *Id.* During her absence, she received a number of calls at the SLDO related to Landmark, including several during business hours. *Id.*

S3 maintains that management's efforts to obtain accurate reports in a timely manner did not constitute harsher treatment or targeting for possible termination. *Id.* He maintains that they gave similar attention to other staff members with similar problems, and that management has a responsibility to maintain the integrity of the Agency's data systems and to conduct business as efficiently as possible.

Allegation 2 – S2 allegedly made daily contacts with S1 to criticize the Complainant and her work

S1 states that he did receive some e-mails and phone calls from S2 regarding the Complainant's "214" time report charges, her total time charged on some cases, and he was also contacted by S2 if he had questions on her cases that were sent to the Regional Office. (Tab F7, p. 4). He maintains that S2 did not contact him daily regarding her work. *Id.* S1 asserts that S2

also contacted him if he had questions regarding other investigators' cases that were referred to the Regional Office. *Id.*

S2 denied that he had daily contacts with S1 regarding the Complainant. (Tab F7, p. 14). He says that he does talk with S1 about once a week and he communicates through email. *Id.* S1 and S2 may discuss issues and cases, how to proceed, questions on submitted cases, and employee performance. *Id.* They did discuss the Complainant's performance as well as the performance of other SLDO employees. *Id.*

Allegation 3 – Directed to commit fraud on "214" Reports

S1 denies that he or S2 ever asked the Complainant to enter inaccurate time on her "214" time reports, but rather, that they wanted her to enter her time accurately. (Tab F2, p. 8). He states that to the best of his information, there were only two times when S2 requested that he (S1) ask the Complainant to amend her "214" time reports. *Id.* at 7. The first time was in March 2005, when she charged three hours on two dates to meetings with S1. *Id.* The Complainant changed the time charged to reflect two hours each for the meetings. *Id.* The second time was in April 2005, when she charged one hour to "other" for a matter that took only 15 minutes. *Id.* S1 notes that charging time to "other" means that less time is needed to be charged to case processing, and that the

Complainant already spent too much time on processing cases. *Id.*

S2 states that neither he nor S1 ever directed the Complainant to commit fraud on her "214" time reports. (Tab F7, p. 14). Rather, they directed her to timely and accurately record her time. *Id.* However, she failed to do so. *Id.*

Allegation 4 – Work Scrutinized More Harshly

This allegation is discussed in Allegation 1 above.

Allegation 5 – S1 with the support and encouragement of S2 and S3 yelled at her and berated the Complainant

S1 denied that he yelled at or berated the Complainant. (Tab F3, p. 15). He further maintains that he has not been encouraged by S2 and S3 to yell at or berate her. *Id.* He has had numerous discussions with the Complainant where she has cried. *Id.* He has not documented these occasions, so he can not respond specifically as to when and how often they occurred. *Id.* The Complainant would often complain about how he spoke to her and that he did not listen to her. However, he maintains that he was frustrated because he had to tell her what was wrong and how to fix it. *Id.* S1 stated that a GS-13 employee with 16 years of experience should not need as many corrections as the Complainant did. *Id.*

S2 states that he never asked S1 to yell at or berate the Complainant. (Tab F7, p. 26). S2 states that it is not part of S1's personality to yell at individuals. *Id.* He states that S1 is one of the "most genuinely nice people" he has ever met. *Id.* S3 states that he has no knowledge of occasions on which S1 yelled at the Complainant. (Tab F3, p. 12).

Allegation 6 – Management treated the Complainant with contempt and hostility

S1 and S3 both deny that the Complainant was treated with hostility and contempt. (Tab F2, p. 17; Tab F3, p. 12). S2's statement regarding this allegation was non-responsive. (Tab F7, pp. 26-28).

Allegation 7 – Management informed her that she was singled out for scrutiny and review and that management intended to terminate her

S1 states that he did not tell the Complainant that she was subjected to more scrutiny than any other employee. (Tab F2, p. 20). The Complainant could not have been under more scrutiny than other employees because a male employee, who was older than the Complainant, was under more scrutiny than anyone else at that time. *Id.* Because he could not discuss what actions were being taken with another employee in the office, he could not discuss that issue with the Complainant. *Id.*

S2 and S3 denied having any knowledge regarding this allegation. (Tab F3, p. 14; Tab F7, p. 28).

Allegation 8 – Charged AWOL for Period covering June 13 through July 22, 2005

S1 states that the Complainant walked out of the office on May 18, 2005, while he was away from the Office. (Tab F2, p. 21). The Acting District Director, who was acting for S1 in his absence, talked the Complainant into completing leave requests to use her available leave (up to May 31, 2005). *Id.* By letter dated May 27, 2005, S3 advised the Complainant that her leave requests were approved until May 31, 2005. *Id.* On June 9, 2005, S3 advised the Complainant that even though she had not submitted leave requests after May 31, 2005, as directed, leave was approved until June 10, 2005, which would exhaust the 64 hours of advance annual leave previously approved and any additional leave she may earn. *Id.* Effective June 3, 2005, the Complainant was placed on LWOP, even though she had not requested it. *Id.* Although S3 reminded the Complainant to submit timely requests for future leave, she did not submit any leave requests. *Id.* at 21-22. In another letter dated June 17, 2005, S3 advised the Complainant that information provided by her health care provider only covered one month, beginning May 19, 2005. *Id.* at 22. She was advised that if she did not return to work by June 20, 2005, additional medical information would be required. *Id.* The Complainant did not submit any additional leave requests or medical information. *Id.*

S1 states that because the Complainant had not supplied leave requests and the necessary medical information to support additional leave, on July 27,

2005, he sent her a letter advising that she would be charged 240 hours of AWOL from June 13 through July 22, 2005. *Id.* She was again advised that it was imperative that she contact him regarding her status and submit proper leave requests and supporting medical documentation. *Id.* S1 advised the Complainant that failure to do so would result in additional. charges of AWOL. *Id.* She did not submit any further leave requests or additional medical information. *Id.* The Complainant never submitted a request for LWOP. *Id.* S1 denies that he received a note in June 2005 from the Complainant. *Id.* at 23. On September 12, 2005, S1 received a fax from the Complainant's medical provider, the first since May 20, 2005. *Id.* He states that he also advised the Complainant that since she failed to submit any leave requests since June 10, 2005, she was charged with 560 hours of AWOL from June 13 – September 16, 2005. *Id.*

Finally, regarding S1's awareness of the Complainant's prior EEO activity, S1 states that he was aware of her prior EEO activity that arose in the mid-1990's when she worked in the Los Angeles EBSA office. S1's statement does not indicate when he became aware of the Complainant's EEO activity that gave rise to this case. The EEO Counselor's Summary Report indicates that the counselor contacted S1 on May 23, 2005 regarding the Complainant's allegations. (Tab B1, p. 3).

S2 states that the Complainant did not request LWOP or any other type of leave until October 4, 2005. (Tab F7, p. 28). S2 notes that while the

Complainant's leave requests indicated that she was requesting leave for stress related to the work environment, he had previously received information that she was in San Francisco taking a non-work-related course on May 20 to May 22, 2005. *Id.* at 29. He states that he was aware that she would need to request some type of alternate leave for these courses, and that she had little leave available. *Id.* S2 states that he verified that the Complainant was in San Francisco on both days in question. *Id.* However, based on the medical note dated May 20, 2005, and her leave requests through May 31, 2005, the Agency decided to grant her the 64 hours of advanced leave she had requested. *Id.* at 30. After she exhausted the advanced annual and all other leave she had, S2 states that he placed her on LWOP from June 3 – June 10, 2005 although she did not request it. *Id.* He confirms the testimony of S1 regarding the subsequent sequence of communications between management and the Complainant. *Id.* at 30-31.

Finally, regarding S2's awareness of the Complainant's prior EEO activity, S2 states that he became aware of the Complainant's EEO complaint on or about May 18, 2005. *Id.* at 29.

S3 generally confirms the testimony of S1 and S2 regarding the Complainant's absences. (Tab F3, pp. 15-19). In particular, S3 states that after the Complainant walked off the job on May 18, 2005, he received a fax on May 20, 2005, from the Complainant's health care provider indicating that she would be absent from work for one month due to depression

and anxiety. *Id.* at 15. As a result, he approved the Complainant's request for sick leave and 64 hours of advance annual leave. On June 9, 2005, S3 wrote to the Complainant and advised her that she was on pay status only until June 3, 2005, and that thereafter she would be on leave without pay. *Id.* at 16. S3 wrote again to the Complainant on June 17, 2005, requesting an update from her regarding her leave. *Id.* Although the Complainant talked twice by telephone with her supervisor after her departure, and wrote to him once, she never provided any leave requests or necessary medical documentation. *Id.* at 16-17.

Finally, regarding S3's awareness of the Complainant's prior EEO activity, S3 states that he was aware that she may have filed in EEO complaint in the Los Angeles Office when she worked there in the mid-1990's. *Id.* at 19. He first learned that the Complainant filed an informal EEO complaint regarding the present matters on May 10, 2005. *Id.*

Allegation 9 – Terminated

By letter dated April 11, 2006, S1 issued a Notice of Proposed Removal to the Complainant, citing two reasons – being absent without leave and "lack of candor" – for the proposed removal. Agency Ex. 7. Concerning the AWOL charge, the proposal explains that despite S1's instructions, the Complainant did not submit proper leave requests or contact him, as requested, concerning her continuing, extended absence. *Id.* The proposal states that she was charged

760 hours of AWOL from June 13 to October 26, 2005. *Id.* After being approved for FMLA leave from October 27 through December 31, 2005 (352 hours), and January 3 through January 25, 2006, the proposal states that she was again placed on AWOL from January 26 through April 7, 2006 (408 hours), as she did not return to work. *Id.* at 7-8.

Concerning the Complainant's lack of candor, the proposal notes that on May 18, 2005, the Complainant informed management that she needed to be off because she was ill. *Id.* at 8. Two days later she submitted a statement from a Physician's Assistant stating that the Complainant had to be off for a month. *Id.* In response, management approved all leave available to her, including 4 hours sick leave and 40.5 hours of advanced annual leave. *Id.* The proposal states that although the Complainant claimed on May 18, 2005, that she could not work due to illness, S2 subsequently became aware that the Complainant attended a Landmark Education Forum in San Francisco, California which began on May 20, 2005. *Id.* The proposal further states that S1 had previously notified the Complainant that she could not use sick leave or previously approved advanced annual leave to care for her father or to attend the course in San Francisco. *Id.* The proposal states that S1 had told her in January 2005 that she could only use annual leave for this purpose. *Id.* The proposal concludes that the Complainant deliberately misled S2, S3, and an employee acting in S1's absence concerning the purpose of her leave requests. *Id.* S1

states that, while steadfastly maintaining that she was ill, she neglected to advise them of her plans to travel to San Francisco on May 19 to attend a non-work-related course from May 20 through May 23, 2005. *Id.* at 8-9. The proposal thus concludes that the Complainant was not forthright concerning her reason for requesting leave on May 18, 2005. *Id.* at 9. The proposal states further that the Complainant's lengthy, unauthorized absences with no foreseeable end have been detrimental to the efficient operation of the office. *Id.* The proposal states as well that the Complainant's lack of candor and misconduct have led S1 to believe that he cannot depend on the veracity of her statements, and that her proposed removal is warranted and will promote the efficiency of the federal service. *Id.*

By letter dated June 16, 2006, the Complainant responded to her proposed removal. Agency Ex. 8. The Complainant acknowledged that she had been unresponsive to management's various attempts to seek leave requests and medical documentation, and attributed her non-response to her ongoing anxiety and depression. *Id.* at 1-2. In addition, she denied that she was deceptive regarding leave use in order to attend a course in San Francisco, and attributed management's conclusions regarding candor to a "major misunderstanding." *Id.* at 2. She requested a reduction in the sanction from removal to a 60-day suspension and reassignment to another office within the SLDO. *Id.*

On July 18, 2006, S3 issued a Decision on Proposed Removal in which he upheld the proposed termination. Agency Ex. 11. The removal letter rejected the Complainant's assertions that her medical condition excused her nonfeasance regarding leave, and concluded that she was "capable of understanding and fulfilling [her] responsibility to this agency concerning [her] absences and made a conscious decision to ignore them." *Id.* at 2. The removal letter stated that the lengthy, unauthorized absences and lack of candor indicate that the agency could no longer rely on the Complainant to successfully perform her job. *Id.* at 3.

Other Evidence

A Senior investigator (male) stated that when he has served as acting supervisor in the absence of S1, S2 has called him and asked him to track report times, attendance, leave taken, and leave requested for all employees in the SLDO. (Tab F5, p. 2). He said he was aware of the Complainant's leave abuses and low productivity. *Id.* He stated that when the Complainant discussed with him management's treatment of her, he advised the Complainant to take steps to improve her performance. *Id.* He further stated that he never witnessed S1 berating or yelling at the Complainant. *Id.*

An Auditor (female), who is also a Union Representative with whom the Complainant often consulted, stated that she and the Complainant would discuss

management's treatment of her, and told the Complainant management was not trying to terminate her but was instead trying to improve her productivity. (Tab F6, p. 1). The auditor never witnessed yelling or disrespectful treatment of the Complainant. *Id.* at 1-2.

The Physician's Assistant, who treated the Complainant and provided management with medical statements regarding the Complainant's stress and anxiety, stated that her assessments of the Complainant's medical condition were based solely on information provided to her by the Complainant. Agency Ex. 6, pp. 14, 16, 71-72. The Physician's Assistant reported to management that the Complainant was experiencing work-related stress and needed to be away from work because this is what the Complainant told her during their brief consultations. *Id.* at 36-38.

The Agency submitted numerous documents, including copies of "214" time reports, PeopleTime Reports, and sign in sheets that show that the Complainant often reported to work late, and frequently did not fill out the "214" reports or filled them out incorrectly. (Tab F2C, pp. 2-7; Tab F2D, p. 1; Tab F2G, pp. 1-2). There were occasions when the PeopleTime Sheets, door logs and "214" reports do not match. (Tab F7A, pp. 1-5; Tab F7B, pp. 2-10; Tab F7C, pp. 2-5; Tab F7D, pp. 1-90). Documents submitted by management also show that the Complainant had higher than average charges in the "other" category (which is time not

charged to case work) when reporting her time. (Tab F2B, p. 1; Tab F7H, pp. 2-3). Memoranda from management document their concerns and efforts to counsel the Complainant regarding the quality and timeliness of her cases during 2004 and part of 2005. (Tabs F2L through F2P; Tabs F7H, pp. 3-6; F7I, pp. 1-2).

A November 5, 2004 memorandum to S1 from S3 provides details of performance deficiencies of a male comparator. (Tab F1R, pp. 1-2). S3 discusses his concerns about the "abysmal performance," including extensive delays in processing cases and excessive time charges. *Id.* at 1. S3 notes that "We need to start early in the new rating period to see if he can improve his performance. If not, I am determined to take whatever action is appropriate." *Id.* Further, S3 stated that he "expect[s] this situation to be monitored closely and . . . will assist in that effort." *Id.* at 2. An email dated January 20, 2005, indicates that S1 also counseled this individual that his failure to follow S3's instructions concerning case processing could result in "disciplinary/adverse action up to and including removal from the federal service." (Tab F1R, p. 12). By memorandum dated September 7, 2005, S1 advised the male comparator that effective September 26, 2005, he would be removed from the flextime program as a result of flextime and leave abuse, and may be subject to further disciplinary action, up to and including removal. (Tab F1R, p. 18).

Legal Analysis

The Complainant has alleged that she was subjected to a hostile work environment based on age and sex. The Complainant also alleged that she was placed on AWOL and terminated in reprisal for participating in EEO activity.

Allegations of Harassment and Hostile Work Environment

Harassment directed at an individual because of his or her race, color, religion, sex, or national origin violates Title VII. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc,* 510 U.S. 17 (1993). To establish a case of harassment based on hostile work environment, a complainant must show that: (1) she belongs to a protected class; (2) she was subject to unwelcome verbal or physical conduct; (3) the conduct complained of was based on one or more of her protected categories; (4) the conduct unreasonably interfered with her work performance or created an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. *McCleod v. Social Security Administration,* No. 01963810, 1999 WL 643307, *3 (E.E.O.C. Aug. 5, 1999), *recons. denied,* 2000 WL 1909682. To be actionable as a hostile work environment, the conduct at issue must be sufficiently severe or pervasive enough to create an objectively hostile work environment – an environment that "a reasonable person would find hostile or abusive." *Harris v. Forklift*

Systems, Inc., 510 U.S. 17, 21-22 (1993); *see also Smith v. Dept. of Veterans Affairs,* No. 01A40925, 2005 WL 2492808, *4 (E.E.O.C. Sept. 28, 2005) (noting that a hostile environment claim generally requires a showing of a pattern of offensive conduct); *Munchbach v. USPS,* No. 01A11681, 2002 WL 1461210, *2 (E.E.O.C. June 18, 2002) ("[C]laims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim."). In assessing whether an environment is sufficiently hostile or abusive, the factfinider "look[s] at all the circumstances," including the frequency and the severity of the alleged discriminatory conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with the Complainant's work performance. *Harris,* 510 U.S. 17 at 23. Properly applied, standards for judging workplace harassment are not intended to be a "general civility code" but instead should "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language [.]" *Faragher v. City of Boca Raton,* 524 US. 775, 788 (1998) (internal quotation and citation omitted).

Based on this analytical framework, the record does not support the conclusion that the Complainant was subject to a hostile work environment because of her membership in a protected class. Although the Complainant is a member of two protected groups based on her sex (female) and age (D.O.B. **/**/1963) and she was subjected to unwelcome

conduct, the Complainant has failed to establish that the Agency engaged in the alleged conduct because of her sex or age. To the contrary, the Complainant's supervisors justified their management actions with non-discriminatory, work-related reasons. The record establishes that the Complainant's managers were legitimately concerned about her leave use, her extended and unexplained absences from the office, and her relatively low case productivity. The record supports the Agency's concerns regarding documented irregularities in how and when the Complainant filled out her "214" reports, charging more time to "other" functions than any other employee, inordinate time spent on processing cases, errors in case processing, and an OIG complaint about the Complainant. The record also establishes that management had reasons to believe that the Complainant engaged in her personal business and educational pursuits during work time, and she received telephone calls and faxes at the SLDO regarding these matters. It was these problems that caused the Complainant to come under scrutiny, and management's monitoring of her case work, her attendance, and her leave were appropriate under the circumstances. Moreover, there is evidence in the record of management's close supervision of another employee who is outside the protected classes at issue in this case, and that treatment was the result of performance issues similar to those of the Complainant's that gave rise to these allegations. Accordingly, a review of the evidence does not support the Complainant's contention that her age and sex were factors in management's treatment of her.

In addition, the alleged conduct was not so severe or pervasive as to rise to the level of actionable harassment under Title VII. Although the Complainant identified a series of events and circumstances she found to be frustrating or discontenting, these appear to have resulted from the sort of unexceptional disagreements, aggravations, and misunderstandings that inevitably occur on the job. Though the Complainant may disagree with management's decision to monitor her work product and leave usage more closely, and may oppose the means by which they implemented that decision, such dissatisfaction does not rise above and beyond the "ordinary tribulations of the workplace" to reach the level of extreme conduct actionable under Title VII. Indeed, once management has become aware of employee performance issues that require counseling and improvement, it is the rare employee that does not experience that attention as "microscopic," "inappropriate," or "hostile," as is alleged in this case. However, work environment claims are not to be judged by the Complainant's subjective view of the circumstances, but rather must be judged by the objective viewpoint of the reasonable person in the Complainant's circumstances. *McCleod* at *3. From an objective viewpoint, management's treatment of the Complainant was based on legitimate concerns about leave abuse and low case productivity, and the nature of their treatment of her regarding these issues was not extreme. In particular, management's directive to the Complainant to make complete and correct entries regarding the time she spent on specific work tasks

was not, objectively viewed, an instruction to falsify her "214" time reports, as she alleged. Even the Complainant's peers, including her union steward, suggested that improving her performance would improve management's response to her. Management's actions regarding these matters were neither hostile, nor abusive in nature, but rather were normal managerial responses to Complainant's performance and conduct problems and the Agency's needs. Accordingly, I find that these actions do not support Complainant's claim that management created a discriminatory hostile work environment.

Claim of Reprisal – Placed on AWOL and Terminated

The allocation of burdens and the order or presentation of proof in a case alleging discrimination is a three-step process. The complainant must either produce direct evidence of discrimination or establish a *prima facie* case of discrimination through circumstantial evidence. To establish a *prima facie* case of discrimination based on circumstantial evidence, the complainant must set forth evidence, which if left otherwise unexplained would support an inference of discrimination. If the complainant establishes a *prima facie* case, then the burden of production shifts to the Agency to articulate a legitimate non-discriminatory reason for its challenged actions. If the Agency does this, it prevails unless the complainant proves, by a preponderance of the evidence, that the legitimate reasons articulated by the Agency were

not its true reasons but were a pretext for discrimination. *McDonnell Douglas Corp, v. Green,* 411 U.S. 792 (1973).

To establish a *prima facie* case of reprisal based on circumstantial evidence, the complainant must show: (1) she participated in a protected activity; (2) agency official(s) taking the action at issue were aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse action. *Whitmire v. Dept. of Air Force,* No. 01A00340, 2000 WL 1489753, at *2 (E.E.O.C. 2000).

The Complainant has met the elements of her *prima facie* case based on reprisal. First, she engaged in protected activity by initiating EEO counseling in this matter on April 25, 2005.[5] Second, the record

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[5] The Complainant also filed an EEO complaint in May 1996, more than eight years before the alleged discrimination in this case. (Tab F1, p. 1). This protected activity is too remote in time to raise an inference of a causal nexus between the protected conduct and any adverse action taken against her. *See, e.g, Clark County School District v. Breeden,* 532 U.S. 268, 273 (2001) (temporal proximity between protected activity and adverse employment action must be "very close" before it will be considered sufficient evidence of causality to establish *prima facie* case); *Webster v. USPS,* No. 01842494, 1986 WL 635192, at *4 (E.E.O.C. 1986) (retaliatory motivation may not be inferred from the more than one year time lapse between the 1980 complaints and the June 1982 incident); *Peace-Jackson v. Dept. of Labor,* No. 01980251, 2001 WL 9534485, at *4 (E.E.O.C. 2001) (approximate three year time lapse between complainant's protected activity and the adverse treatment precludes an inference of retaliatory motivation).

establishes that her supervisors were aware of the EEO complaint.[6] Third, the Complainant suffered adverse employment actions when she was placed on AWOL and when she was notified of her proposed removal on April 11, 2006 and subsequently terminated on July 18, 2006. Finally, the close temporal proximity between her supervisor's knowledge of her EEO activity and the AWOL (about 1 month), and between the EEO activity and the notice of proposed removal (11 months), establishes a circumstantial nexus between the protected activity and the adverse action. As a result, the Complainant's *prima facie* case of reprisal is satisfied.

Because the Complainant has met her *prima facie* burden to establish reprisal, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for its action. The record is replete with management's legitimate, non-discriminatory justifications for its treatment of the Complainant. Having abruptly walked off the job on May 18, 2005, the Complainant did not submit any subsequent leave requests, respond to letters from management regarding her intentions to return to work, or submit medical documentation to support her extended absence. By June 1, 2005, she had exhausted all available leave, including advanced annual leave, and

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[6] The record indicates that S1 learned of the instant complaint on May 23, 2005, that S2 learned of it on or about May 18, 2005, and S3 learned of it on May 10, 2005. (Tab B1, p. 3; Tab F7, p. 29; Tab F3, p. 19).

management had placed her on non-pay status. Thereafter, she was placed on AWOL for 240 hours between June 13 and July 22, 2005, and subsequently terminated. In responding to the notice of proposed removal, the Complainant acknowledged that she had failed to respond appropriately to management's multiple requests for information regarding leave. Given the circumstances, the record supports the conclusion that EBSA had legitimate, nondiscriminatory reasons for putting the Complainant on AWOL and subsequently terminating her.

Other than her assertion that management harassed her with the intent of terminating her, which was rejected above, the Complainant offers no evidence that EBSA's stated reasons for placing her on AWOL and then terminating her were pretextual. The Complainant does not claim, nor does the evidence show, that any other employee engaged in similar conduct and was treated more favorably. Accordingly, since the Commission has consistently held that mere assertions are not enough to establish pretext or causation, I find that Complainant has failed to show pretext. *Richardson v. Department of Agriculture,* No. 03A40016, 2003 WL 22988898 (E.E.O.C. Dec. 11, 2003) (mere assertions are insufficient to establish discriminatory animus).

Statement of Conclusions

Accordingly, after a careful review of the record, including all arguments and evidence contained in

the record but not specifically addressed herein, I find that the record does not support a conclusion that Complainant was discriminated against as alleged. I find Complainant has failed to demonstrate that she was subjected to a hostile work environment based on her age and sex. Nor did she establish that she was subjected to reprisal when she was placed on AWOL and subsequently terminated.

Statement of Relief

Inasmuch as the complaint is without merit, no relief is granted.

Statement of Notice and Rights

Your case is a mixed case under 29 C.F.R. § 1614.302(a)(1), because it involves a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action (discharge) that can be appealed to the Merit Systems Protection Board (MSPB). Because this case involves a mixed case complaint, if you are dissatisfied with this decision, you may appeal the matter to the MSPB (not the EEOC), within 30 days of receipt of this decision. 29 C.F.R. § 1614.302(d)(1)(ii). To file an appeal with the MSPB, contact the MSPB at the following, address:

U.S. Merit Systems Protection Board
Central Regional Office
Martin Baumgaertner

Regional Director and
Chief Administrative Judge
230 South Dearborn Street
31st Floor
Chicago, Illinois 60604-1669

(312) 353-2923
FAX (312) 886-4231

You also may file an appeal electronically through the MSPB's website at www.mspb.gov.

Instead of appealing to the MSPB, you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of this decision. 29 C.F.R. § 1614.310(a). You are advised that if you file a civil action, you must name the appropriate Department or Agency Head as the defendant. Failure to name the head of the Department or Agency may result in the loss of any judicial redress to which you may be entitled. The head of the Department of Labor is Elaine L. Chao, Secretary of Labor.

s/ Annabelle T. Lockhart 10/19/2007
ANNABELLE T. LOCKHART DATE
Director,
Civil Rights Center

[Certificate Of Service Omitted]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

CAROLINE M. KLOECKNER,
Appellant,

v.

DEPARTMENT OF LABOR,
Agency.

DOCKET NUMBER
CH-0752-08-0150-I-1

DATE:
February 27, 2008

[Counsel Information Omitted]

BEFORE
Howard J. Ansorge
Administrative Judge

INITIAL DECISION

Caroline M. Kloeckner was a Pension Investigator, GS-13, for the Employee Benefits Security Administration of the Department of Labor in Kansas City, Missouri. The agency removed Ms. Kloeckner from employment effective July 21, 2006. After she filed a timely appeal with the Board, her appeal was dismissed without prejudice on September 18, 2006. On November 28, 2007, the appellant re-filed her appeal with the Board's Central Regional Office.

For the reasons set forth below, the re-filed appeal is DISMISSED as untimely filed.

ANALYSIS AND FINDINGS

Background

When the appellant filed her first MSPB appeal, the removal action was ripe for adjudication. Nevertheless, the appellant moved to dismiss the first appeal because she wanted to complete discovery in another matter pending before the Equal Employment Opportunity Commission (EEOC). *See Kloeckner v. Department of Labor*, MSPB Docket No. CH-0752-06-0746-I-1, slip op. at 2 (MSPB Initial Decision, Sept. 18, 2006). The appellant's EEOC case involved allegations of a hostile work environment based on sex and the agency's decision to place her in AWOL status. Although the agency opposed the appellant's motion to dismiss, the Board's administrative judge granted the motion and issued an initial decision (dated September 18, 2006) dismissing the appeal without prejudice. The initial decision set a specific deadline for re-filing the appeal, advising the appellant she had to re-file the appeal:

> either (A) 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007 – whichever occurs first. This case will not be accepted for refiling after January 18, 2007.

(*See Kloeckner v. Department of Labor*, MSPB Docket No. CH-0752-06-0746-I-1, slip op. at 3 (MSPB Initial Decision, Sept. 18, 2006) (footnote omitted)).

On September 19, 2006, the day after the appellant's MSPB appeal was dismissed, the EEOC granted a joint motion from the agency and the appellant to add the removal action to the appellant's EEOC complaint.

On October 23, 2007, the agency issued its final decision on the appellant's EEOC complaint. The appellant received the agency's final decision on October 29, 2007. The agency's final decision stated that the appellant had 30 days from her receipt of the agency's final decision to file an MSPB appeal. The appellant acted within that deadline, re-filing her MSPB appeal on November 28, 2007 – which was ten months after the January 18 filing deadline set by the initial decision dismissing her first MSPB appeal.

Burden of Proof

The appellant has the burden of showing she had good cause for the untimely re-filing of her appeal. *See Shiflett v. United States Postal Service,* 839 F.2d 669, 672 (Fed. Cir. 1988); 5 C.F.R. § 1201.56(a)(2) (2007). To establish good cause for the untimely re-filing of an appeal, the appellant must show she exercised ordinary prudence or due diligence under the circumstances. *See Shults v. United States Postal Service,* 40 M.S.P.R. 673, 674 (1989); *Alonzo v. Department of the Air Force,* 4

M.S.P.R. 180, 184 (1980).[1] Factors for considering whether there is good cause for an untimely filing include, but are not limited to, the following: (1) the length of the delay; (2) whether the appellant was notified of the time limit or was otherwise aware of it; (3) the existence of circumstances beyond the control of the appellant that affected her ability to comply with the time limit; (4) the degree to which the appellant may have been negligent; (5) circumstances that show any neglect is excusable; (6) a showing of unavoidable casualty or misfortune; and (7) the extent and nature of the prejudice to the agency that would result from waiver of the time limit. *See Alonzo,* 4 M.S.P.R. at 184.

Reasons for Untimely Re-Filing

In explaining her reason for waiting ten months after the deadline to re-file her appeal, the appellant asserts that when she filed her motion to dismiss her first MSPB appeal, the agency had not yet decided her discrimination claim. The appellant further asserts that because the agency has now decided her discrimination claim (by decision dated October 23, 2007), her case is different than the one the MSPB dismissed in September 2006.

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[1] The Board applies the analysis set forth in *Alonzo* when determining whether an appellant has shown good cause for an untimely re-filing of an appeal. *See Kellus v. United States Postal Service,* 69 M.S.P.R. 1, 3 (1995).

The appellant's argument is not persuasive. Her case is not different than it was when she filed her first MSPB appeal. The adverse action from which she is appealing remains the same, i.e., the agency's decision to remove her from employment. In fact, the appellant was free to raise her discrimination claim as an affirmative defense in her first MSPB appeal. Moreover, the Board will not waive its timeliness requirements when an appellant consciously elects another forum in which to challenge an adverse action. *See Wolfe v. Department of the Army*, 77 M.S.P.R. 175, 180 (1998) (appellant withdrew MSPB appeal to pursue EEO complaint); *Murray v. Department of the Army*, 48 M.S.P.R. 338, 341 (1991) (appellant filed EEO complaint before MSPB appeal).

The appellant also asserts that the instant appeal should be heard pursuant to the time limitation described in 5 C.F.R. § 1201.154(a), under which an individual can file an MSPB appeal within 30 days after receiving the agency's final decision of a discrimination complaint. But the filing deadlines described in 5 C.F.R. § 1201.154(a) do not apply to the instant case because the appellant's first MSPB appeal was dismissed – and the re-filing deadline was established – before the removal action was merged into the appellant's EEO complaint. Moreover, when dismissing an appeal without prejudice to the right to re-file pending the resolution of another matter, an administrative judge should set a date certain by which the appeal must be re-filed. *See, e.g., Selig v. Department of the Army*, 102 M.S.P.R. 189, 192 (2006); *Medina v.*

Department of the Air Force, 66 M.S.P.R. 194, 197 (1995), *review dismissed,* 53 F.3d 348 (Fed. Cir. 1995) (Table).

Although the final decision on the discrimination claim stated the appellant had 30 days from her receipt of the final decision to file an MSPB appeal, such notice does not alter the deadline set by the initial decision dismissing the appellant's first MSPB appeal. It is well settled that an erroneous notice of appeal rights does not create a right of appeal where one would not otherwise exist. *See Mosher v. United States Postal Service,* 32 M.S.P.R. 355, 357 (1987); *Acosta v. Department of the Navy,* 3 M.S.P.R. 96, 97 (1980).

The initial decision dismissing the appellant's first MSPB appeal set a clear deadline for re-filing the appeal – within 30 days after the EEO decision or by January 18, 2007, **whichever occurs first.** The initial decision also clearly advised her that she would lose her right to appeal to the Board if she did not re-file her appeal by that deadline – the initial decision stated that the appeal "will not be accepted for re-filing after January 18, 2007."

In the face of clear notice of the re-filing deadline, as well as the consequences for failing to meet that deadline, the appellant, with assistance of counsel, decided to pursue her EEO complaint. The appellant has not asserted that any circumstances beyond her control (such as unavoidable casualty or misfortune) prevented her from re-filing her appeal by the

January 18, 2007, deadline. The appellant did not have the discretion to determine on her own the best use of agency and Board resources. *See Tynes v. Department of the Air Force,* 79 M.S.P.R. 357, 359-60 (1998), *aff'd,* 194 F.3d 1332 (Fed. Cir. 1999) (Table). If the appellant believed it was inconvenient to pursue her MSPB appeal before the agency issued the final decision on her EEO complaint, she could have asked the Board for an extension of time in which to re-file her appeal or she could have re-filed the appeal and then moved to have the appeal dismissed without prejudice. *See Medina,* 66 M.S.P.R. at 198. The appellant's failure to do so, or to make any other similar inquiry with the Board, demonstrates a lack of due diligence. *See Medina,* 66 M.S.P.R. at 198.

The appellant's 10-month delay in re-filing her appeal was lengthy. Under similar circumstances where appeals have been dismissed without prejudice to re-file within a designated period after the occurrence of an event or by a date certain if the event has not yet occurred, the Board has found a lack of good cause for an untimely re-filed appeal. *See, e.g., Tynes,* 79 M.S.P.R. at 357 (6-month delay in re-filing after appeal was dismissed State appellate court's review of criminal conviction); *Medina,* 66 M.S.P.R. at 194 (15-month delay in re-filing after appeal was dismissed pending trial court's decision in criminal case). Accordingly, because the appellant has not shown that circumstances beyond her control prevented her from meeting the filing deadline, I

conclude she has not shown good cause for the untimely re-filing of her appeal.

DECISION

The appeal is DISMISSED as untimely filed.

FOR THE BOARD: s/ Howard J. Ansorge
Howard J. Ansorge
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 2, 2008,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery

service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice,* and Forms *5*, *6*, and *11*.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLYN M. KLOECKNER
432 South Gore Street
St. Louis, Missouri 63119

Plaintiff,

v.

ELAINE L. CHAO
Secretary of Labor,
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Defendant.

FILED
MAY 1, 2008

Civil No. _____

Case: 1:08-cv-00762
Assigned To:
Leon, Richard J.
Assign. Date:
5/1/2008
Description:
Employ. Discrim.

COMPLAINT

1. This is an action to redress Defendant's discrimination against Plaintiff because of her (1) gender, (2) age, and (3) disability under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* ("Act"), and (4) for acts of reprisal for her having filed an EEO complaint. Plaintiff, during the period of time covered by this Complaint, was an employee of the Employee Benefits Security Administration, U.S. Department of Labor ("Agency"), St. Louis, Missouri.

JURISDICTION

2. This court has jurisdiction under 28 U.S.C. § 1331 because this matter arises under the laws of the United States, under 28 U.S.C. § 1343(a)(4) for damages and equitable relief under an Act of Congress providing for the protection of civil rights, and under 42 U.S.C. § 2000e-5(f)(3) for actions brought under the Civil Rights Act of 1964.

3. All conditions precedent to the filing of this action have been met by Plaintiff in that she has filed a timely EEO complaint with the Agency, filed a Formal Complaint with the Agency, and requested an administrative hearing with the Equal Employment Opportunity Commission ("EEOC").

4. The Agency issued a Final Agency Decision rejecting Plaintiff's EEO claims of discrimination. This is a timely appeal from the Final Agency Decision.

VENUE

5. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e)(1), and 42 U.S.C. § 2000e-5(f)(3). Defendant is an agency of the United States with its principal headquarters in the District of Columbia.

PARTIES

5. [sic] Plaintiff, Carolyn M. Kloeckner, resides in St. Louis, Missouri. She was employed by the Agency in St. Louis, Missouri, during the time period of the

events described in this Complaint. Defendant, Elaine L. Chao, 200 Constitution Avenue, N.W., Washington, D.C. 20210, is the Secretary of Labor.

PROCEDURAL HISTORY

6. Plaintiff initially contacted an EEO counselor on April 25, 2005, and filed a Formal Complaint on June 13, 2005, alleging that she had been subjected to a hostile work environment based on sex and age.

7. On August 4, 2005, Plaintiff sought to amend her complaint to include reprisal for prior EEO activity, based on the Agency's decision to place her on AWOL status. This claim was accepted on August 18, 2005.

8. On June 20, 2006, Plaintiff requested a hearing before an Administrative Judge of the Equal Employment Opportunity Commission ("EEOC"). On August 24, 2006, an EEOC administrative judge acknowledged that request for hearing.

9. On September 19, 2006, the Administrative Judge granted a joint motion filed by Plaintiff and by the Agency to amend the complaint to include the Agency's decision to remove the Plaintiff, effective July 21, 2006.

10. On April 17, 2007, the EEOC Administrative Judge, for reasons not relevant here, cancelled the scheduled hearing, and returned the case to the Agency for issuance of a Final Agency Decision.

11. The Agency, in a Final Agency Decision dated October 23, 2007, found that Plaintiff was not discriminated against based on sex or age, and was not the victim of reprisal. The Final Agency Decision was received by Plaintiff's counsel on October 29, 2007.

12. The Final Agency Decision states that Plaintiff may appeal the Agency's decision, within 30 days of receipt, either to the Merit Systems Protection Board ("MSPB" or "Board") or in an appropriate U.S. District Court.

13. Plaintiff filed her appeal with the MSPB within the 30 day limit, on November 28, 2007.

14. In an Initial Decision dated February 27, 2008, the MSPB Administrative Judge determined that the Board was without jurisdiction to hear Plaintiff's appeal. The Initial Decision became final on April 2, 2008.

15. This Complaint is filed within 30 days of the date of the final decision of the MSPB on Plaintiff's appeal of the Final Agency Decision.

FACTS

16. Plaintiff, female, born ***, 1963, was employed by the Agency from July, 1989 until July, 2006.

17. Plaintiff, beginning in 1996, held the position of Senior Investigator, GS-13.

18. Steven Newman was Associate Regional Director of the Agency during the time period in question. In that position, he was Plaintiff's second level supervisor.

19. Gary Newman (no relation) was District Supervisor of the Agency during the time period in question. In that position, he was Plaintiff's supervisor.

20. During the Spring or Summer of 2004, Steven Newman began an intensive, highly intrusive "investigation" of all aspects of Plaintiff's work performance, based on rumors he had heard in the office that Plaintiff was, among other things, falsifying her time records, leave statements, travel records, sign in records, and conducting a private business from her U.S. Government office. Plaintiff was singled out for this investigation based on false rumors disseminated by a fellow employee with a personal vendetta against Plaintiff and based on Plaintiff's status as female.

21. Steven Newman's "investigation" of Plaintiff included his shadowing her around the office to monitor the individuals with whom she was engaged in conversation. This intrusive "investigation" itself was discriminatory, and, because male employees were not subjected to this treatment, based on sex, in violation of Title VII of the Civil Rights Act of 1964.

22. In January, 2005, the Agency was informed that a complaint had been filed against Plaintiff with the Office of Inspector General, Department of Labor, raising many of the same allegations first reported

through rumor in 2004: arriving at work late; leaving early; falsification of sign in/sign out times; working on outside business interests while in the office.

23. Steven Eischen, Regional Director of the Agency, upon receipt of the IG Complaint, assigned Steven Newman to investigate it.

24. During the period covered by the "investigation," Plaintiff's work performance was scrutinized to a degree, and she was held to a standard, not applied in the case of investigations of agency employees who were male, and less than 40, constituting discrimination based on sex and age.

25. During the period of the "investigation," Plaintiff's immediate supervisor, Gary Newman, told her on several occasions that management had targeted her and that they intended to terminate her. Male employees of the Agency, less than 40 years of age, were not subjected to this type of pressure. These statements contributed to creation of a hostile work environment, based on sex and age, in violation of Title VII.

26. Gary Newman added to the strain in the office by treating Plaintiff in an verbally-abusive manner based on her sex. He often would sit down on Plaintiff's desk, in a physically intimidating manner, notwithstanding Plaintiff's repeated protests that he not do so. Mr. Newman did not behave in such manner with his male subordinates. These actions contributed to creation of a hostile work environment, based on sex and age.

27. Plaintiff, under great stress and suffering from depression as a result of the investigations and sexually-hostile environment, left the office in May, 2005. Rather than place her on leave without pay, as Plaintiff requested, the Agency listed her as AWOL. The Agency's decision to place Plaintiff on AWOL status was based on her gender, age and disability. Plaintiff's treatment, through the "investigation," as well as abusive treatment by Gary Newman, constituted hostile work environment based on sex.

28. The Agency terminated Plaintiff, effective July 21, 2006, for Absence Without Leave and for Lack of Candor.

29. The Plaintiff's absences from work were medically necessary and her emotional condition – depression and anxiety – was work-related. The Agency's decision to place her on AWOL status, rather than on LWOP, and then to terminate her, was based on her disability, in violation of the Rehabilitation Act of 1973.

30. The investigation itself, led by Steven Newman, and never completed, constituted a hostile work environment based on sex, due in part to Newman's extra-marital relationship with Laura Lammert (now Laura Newman) the employee responsible for disseminating the false rumors about Plaintiff's work performance. The "investigation" thus was tainted from the outset because Steven Newman had a vested interest in the outcome, based on his relationship with Ms. Lammert.

31. Ms. Lammert, the employee passing on false rumors about Plaintiff, bore a grudge against Plaintiff for many years, even commenting, in extremely derogatory terms, about Plaintiff's personal life and dating partners, attempting to undermine her reputation and credibility within the Agency's headquarters office. Male employees were not treated in this manner by Agency management officials.

32. When Mr. Eischen asked Steven Newman to investigate Plaintiff's conduct, Mr. Newman failed to recuse himself from the investigation, based on his extra-marital relationship with the employee who was the source of the false rumors, and, presumably, the IG Complaint, and failed to inform Mr. Eischen that the allegations in the complaint should be viewed skeptically, based on Ms. Lammert's long record of hostility toward the Plaintiff. Steven Newman's decision to lead the investigation himself constitutes a separate instance of hostile environment harassment based on sex, age and disability, knowing, as he did, that Ms. Lammert, who passed on the false rumors and, presumably, filed the IG Complaint, had a long record of hostility towards Plaintiff, based on sex and age.

33. The investigation of Plaintiff's performance by Steven Newman was so invasive, intense and personal, and out of proportion to that experienced by other Agency employees who were younger than Plaintiff, who were male, and who did not suffer from depression and anxiety, that it constitutes hostile environment harassment based on sex, age, reprisal and

disability. That conduct helped drive Plaintiff from the work place in May, 2005.

34. With respect to Plaintiff's claim of reprisal, she participated in a protected activity; the proposing and final agency decision makers were aware of the protected activity; subsequently, she was subjected to adverse action – removal – by the Agency, and a nexus exists between the protected activity and the adverse action. Plaintiff was removed from her position in reprisal for her participation in the Agency's EEO process, in violation of Title VII of the Civil Rights Act of 1964.

CLAIMS

35. All of the allegations contained in paragraphs 1-34 are incorporated herein as if set forth verbatim.

36. Defendant's actions in conducting a tainted, biased, and overly-intrusive investigation, and placing Plaintiff on AWOL status, created a hostile work environment and constitute discrimination based on sex and age, in violation of Title VII of the Civil Rights Act of 1964.

37. The Agency's decision to remove Plaintiff from her position constitutes reprisal for her participation in the EEO process, as well as a violation of the Rehabilitation Act of 1979.

38. The Agency's actions resulted in a worsening of Plaintiff's emotional condition, causing her to depart from the workplace as of May 18, 2005. These actions

on the part of the Agency constitute hostile environment discrimination based on sex, age, and disability in violation of Title VII and the Rehabilitation Act of 1973.

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Accept jurisdiction of this case.

2. Grant Plaintiff a trial by jury on all issues so triable.

3. Declare that Plaintiff has suffered acts of discrimination at the hands of defendant based on her gender, age, disability and reprisal.

4. Award compensatory damages for intentional discrimination under the Civil Rights Act of 1991.

5. Award reasonable attorney's fees and all other relief to which Plaintiff may be entitled.

Respectfully submitted,

s/ Larry J. Stein

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-184

In The
Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

If the Merit Systems Protection Board decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?

PARTIES

The parties are listed in the caption.

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OPINIONS BELOW

The May 13, 2011 opinion of the Court of Appeals, which is reported at 639 F.3d 834 (8th Cir. 2011), is set out at pages 1a-10a of the Petition Appendix. The February 18, 2010 order of the District Court, which is unofficially reported at 2010 WL 582590 (E.D. Mo.), is set out at pages 11a-22a of the Petition Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on May 13, 2011. The Petition for Writ of Certiorari was filed on August 11, 2011. This Court granted certiorari on January 13, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set forth in the appendix to the brief.

STATEMENT

This case arises out of the intersection of three bodies of law. The Civil Service Reform Act of 1978 (CSRA) established the Merit Systems Protection Board (MSPB), and authorized certain federal employees to appeal specified adverse employment actions to the

MSPB. A number of federal employment antidiscrimination statutes, including in this instance Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act (ADEA), expressly apply to federal employees, and contain their own remedial provisions. The Equal Employment Opportunity Commission (EEOC) is authorized by Title VII,[1] the ADEA[2] and Executive Order[3] to establish an administrative process for addressing complaints of unlawful discrimination against federal workers.

When a federal employee asserts a claim that discrimination forbidden by Title VII or the ADEA occurred in connection with an agency action that would be appealable to the MSPB, that claim is termed a mixed case. The administrative handling of mixed cases is subject to the overlapping regulations of the MSPB and the EEOC. Litigation of a mixed case in federal court is governed by the interrelated provisions of the CSRA and the underlying antidiscrimination statutes.

In order to evaluate the jurisdictional issue presented by mixed cases, it is helpful to understand the three distinct types of claims and administrative processes involved.

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[1] 42 U.S.C. § 2000e-16(b).

[2] 29 U.S.C. § 633a(b).

[3] Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

Civil Service Reform Act Claims (Non-Discrimination Cases)

The CSRA authorizes the MSPB to hear certain appeals by federal employees regarding adverse employment actions. The types of appeals that the MSPB can entertain are subject to several types of restrictions. Of particular relevance here, appeals are generally limited to challenges to five types of adverse actions: dismissals, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs of 30 days or less. 5 U.S.C. § 7512. The criteria delineating whether a particular adverse action can be appealed to the MSPB are important here because those criteria determine whether a discrimination claim is a mixed case.

The CSRA itself creates two types of claims that can be raised in an appeal to the MSPB. First, in any appeal to the MSPB, the agency which took the disputed adverse action bears the burden of demonstrating that its decision was supported either by substantial evidence or by a preponderance of the evidence, depending on the type of action in question. 5 U.S.C. § 7701(c)(1). Second, even when the agency meets that burden, the MSPB will overturn the adverse action if the employee "shows harmful error in the application of the agency's procedures in arriving at [the] decision." 5 U.S.C. § 7701(c)(2)(A). In addition to these CSRA claims, the claimant may challenge a covered adverse action on the ground that it violates some other provision of federal law.

The CSRA and MSPB's regulations establish the overall framework governing appeals to the MSPB.[4] An appeal is initially assigned to an administrative judge, who may oversee a number of preliminary matters, supervise discovery, and conduct a hearing. The administrative judge issues a written opinion, which becomes the final action of the MSPB unless there is a petition for review by the MSPB itself. The MSPB has discretion to select which decisions of an administrative judge it will review.

While the CSRA and the MSPB regulations address a number of issues, a significant part of the practice, procedure and standards utilized in CSRA appeals derives from past decisions and actions of the MSPB and individual administrative judges. Since the creation of the MSPB in 1978, the MSPB and its administrative judges have decided tens of thousands of cases. The leading manual regarding practice before the MSPB is more than 4,000 pages long.[5] Effective representation of clients in MSPB appeals requires detailed familiarity with this complicated and still-evolving system, and the number of attorneys who specialize in this area of federal law is relatively small. See *Devine v. White*, 697 F.2d 421, 425 (D.C. Cir. 1983) (noting "the statutory maze of the CSRA ... [an] Act ... fraught with ambiguities [and]

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[4] See 5 U.S.C. §§ 7701 *et seq.*; 5 C.F.R. part 1201.

[5] Peter Broida, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (28th ed. 2011).

peppered with provisions that appear at cross purposes").

The final decision of the MSPB (except with regard to a mixed case) is subject to limited judicial review in the Federal Circuit.[6]

Non-Mixed Case Discrimination Claims

EEOC regulations establish a multi-step procedure for addressing non-mixed complaints of discrimination, those which do not involve an adverse action that is appealable to the MSPB. A federal employee is required to take two steps to initiate the administrative process. Within 45 days of the disputed action the employee must contact an agency Counselor. If the matter is not resolved by the Counselor, the employee must be given written notice of the right to file a discrimination complaint. The employee must file that complaint within 15 days of receipt of that written notice.[7] Once the agency receives such a complaint, it is required to conduct an investigation into the allegation of discrimination and to complete that investigation within 180 days, a deadline which frequently is not met.[8] If the employee does not ask for a hearing, the agency will then make a final decision on the complaint.

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[6] 5 U.S.C. § 7703(c).

[7] 29 C.F.R. §§ 1614.105, 1614.106.

[8] 29 C.F.R. § 1614.108.

After the investigation is complete, the employee also has the option of requesting that the complaint be heard by an administrative judge appointed by the EEOC. That hearing process includes provisions for discovery. The decision of the EEOC administrative judge, however, is not binding on the agency. Even if the EEOC administrative judge finds that discrimination occurred, the agency may still reject the claim; an agency which does so, however, must also appeal the decision of the administrative judge to the EEOC Office of Federal Operations.[9] If the employee is dissatisfied with the agency's final decision (whether or not preceded by a hearing), the employee also may appeal to the EEOC Office of Federal Operations. A decision by the EEOC on appeal is binding on the agency.[10] If the employee is dissatisfied with the decision of either the agency or the EEOC, he or she may file suit in district court, where the discrimination claim will be decided de novo.

Mixed Case Discrimination Claims

A mixed case arises when a claimant challenging an MSPB-appealable action asserts that the adverse action was the result of discrimination[11] that violates section 717 of Title VII, sections 631 or 633a of the

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[9] 29 C.F.R. §§ 1614.109, 1614.110.

[10] 29 C.F.R. §§ 1614.401-1614.405.

[11] The discrimination claim could involve a claim of retaliation forbidden by the statute involved.

ADEA, section 501 of the Rehabilitation Act, or the equal pay provision in section 6(d) of the Fair Labor Standards Act. The administrative scheme for addressing mixed claims is a hybrid of the MSPB appeal process and the non-mixed case process.

"The courts and commentators appear to be unanimous in their denunciation of th[e] unnecessarily elaborate and confusing [mixed case] system of intertwined administrative and judicial review." *McAdams v. Reno*, 858 F. Supp. 945, 949 n.5 (D. Minn. 1994).[12] "To say that the appeal process for federal employees is byzantine might be an understatement." *DiPaulo v. Potter*, 570 F. Supp. 2d 802, 811 n.14 (M.D.N.C. 2008). A Chairman of the MSPB warned that "the sheer complexity of the remedial scheme may inadvertently compromise the rights of the employees it intends to protect."[13] Another Member of the MSPB compared the mixed case process to the Labyrinth built by Daedalus to confine the Minotaur, noting that although after slaying the monster the hero Theseus

> escaped the Labyrinth, ... even he would be hard pressed to find his way through the convoluted maze of overlapping jurisdiction which marks the mixed case area where

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[12] *Taylor v. Mabus*, 685 F. Supp. 2d 94, 97 (D.D.C. 2010) ("courts bestow labels such as 'byzantine' and 'extremely complicated' on this statutory and regulatory framework").

[13] Daniel R. Levinson, *Federal Personnel Law and the Mixed Case*, 37 Labor Law J. 811, 815 (1986).

federal discrimination and personnel law intersect.

Ignacio v. U.S. Postal Serv., 28 M.S.P.R. 337, 341 (1985) (Devaney concurring and dissenting);[14] see also *Sloan v. West*, 140 F.3d 1255, 1257 (9th Cir. 1998) (noting "the jurisdictional Gordian knot formed when Title VII and civil service administrative claims are interlaced"). The EEOC has repeatedly acknowledged the complexity of the system, noting the inappropriateness of "imput[ing to claimants] perfect knowledge of the complex interplay between MSPB and agency processing of mixed cases." *Lassiter v. Runyon*, 1995 WL 644300, at *3 (E.E.O.C. Oct. 26, 1995).[15] Courts have noted the difficulty of "navigating the procedural maze for the processing of a mixed case." *Valentine-Johnson v. Roche*, 386 F.3d 800, 802 (6th Cir. 2004). The leading expert on MSPB practice has criticized

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[14] See *Jones v. U.S. Postal Serv.*, 92 M.S.P.R. 685, 700 (2002) ("Mixed cases are subject to complex procedures which have a significant potential to confuse the parties.") (Slavet, concurring).

[15] *Adkins v. Bair*, 2012 WL 169813, at *8 (E.E.O.C. Jan. 13, 2012) ("mixed case [agency] jurisdictional issues are 'confusing' "); *Booker v. Wynne*, 2007 WL 4146068, at *1 (E.E.O.C. Nov. 13, 2007) ("[administrative judge] was concerned that complainant did not understand the complexities associated with processing a mixed-case"); *Martin v. Widnall*, 1997 WL 633785, at *2 (E.E.O.C. Sept. 17, 1997) ("the regulations in this area are admittedly confusing").

the mixed case process as "so convoluted that it was destined to fail."[16]

This complex process has at times confounded the officials responsible for administering it, as well as the employees who attempt to use it. The Federal Circuit has expressed concern about "the confusion that has plagued the Board and EEOC dual jurisdiction over mixed case complaints." *Whittington v. MSPB*, 80 F.3d 471, 474 n.4 (Fed. Cir. 1996). A Chairman of the MSPB has described the mixed case process as a "form of agony imposed on the employing agency."[17] In *Butler v. Frank,* the EEOC observed that "the agency is still confused about the procedures for processing mixed-case complaints." 1988 WL 1079160, at *2 (E.E.O.C. Apr. 14, 1988). The courts, the EEOC and the MSPB have all had to deal with cases in which EEOC or agency officials had given a complainant incorrect advice about how to proceed with his or her mixed case.[18] Because of the

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[16] Peter B. Broida, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE, 2080 (24th ed. 2007); see Morris A. Tanner, Jr., *Mixed Cases – A Primer for Beginners*, 35 A. F. L. Rev. 237, 240 (1991) ("[b]ecause of the complex nature of the administrative complaint process, this process presents many pitfalls for the unwary employee ... "); John P. Stimson, *Unscrambling Federal Merit Protection*, 150 Mil. L. Rev. 165, 203 (1995) (referring to the "mixed case Bermuda triangle").

[17] Levinson, *supra* n.13, at 812.

[18] *Valentine-Johnson*, 386 F.3d at 802; *Lozado-Boulware v. Snow*, 2003 WL 1786856, at *5 (N.D. Ill. Mar. 31, 2003); *Walker v. Marsh*, 1989 WL 1006641, at *4 (E.E.O.C. Mar. 1, 1989); *Mosher v. U.S. Postal Serv.*, 32 M.S.P.R. 355, 357 (1987); J.A. 49.

confusion regarding the governing procedures, agency lawyers at times take inconsistent positions in different forums.[19] By the time they reach federal court, mixed cases have "typical[ly] complicated and protracted procedural histor[ies]." *Pourbabi v. Mineta*, 2007 WL 2549230, at *1 (D.D.C. Sept. 7, 2007).[20]

The history of this case illustrates a number of the procedural and jurisdictional problems that can arise in a mixed case.

Administrative Proceedings

Prior to 2006, Carolyn Kloeckner was a Senior Investigator for the Employment Benefits Security Administration of the United States Department of Labor. In June 2005, Kloeckner filed a timely administrative complaint asserting that she had been subjected to a hostile work environment based on her age and sex. In August 2005, Kloeckner amended her administrative complaint to allege that, in retaliation for her earlier discrimination complaint, agency

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[19] *Valentine-Johnson*, 386 F.3d at 811 ("The Air Force ... filed a motion to dismiss the MSPB appeal on the basis that Valentine-Johnson's termination claim should be heard in district court. Once in the district court, the Air Force promptly reversed course and sought to block the court's review of the termination claim.").

[20] *Wilkie v. Dept. of Health and Human Servs.*, 2008 WL 818892, at *4 (D.N.D. Mar. 24, 2008) ("The Court is now asked to determine whether this convoluted and confusing series of events constituted an exhaustion of Wilkie's administrative remedies.").

officials had charged her with being absent without leave, rather than on medical leave without pay, for a six-week period beginning the day she filed her original complaint. The original and amended complaints both asserted a non-mixed claim of discrimination.

In the late spring of 2006, the Department of Labor completed its investigation of the amended complaint. On June 20, 2006, Kloeckner requested a hearing before an EEOC administrative judge. On July 18, 2006, while the original non-mixed complaint was pending at the EEOC, the Department of Labor terminated Kloeckner. One basis asserted for that termination was that since the late spring of 2005 Kloeckner had been classified as absent without leave; that contention involved a continuation of the dispute raised by Kloeckner's earlier discrimination complaint regarding whether she was entitled to continuing medical leave.

At this juncture the EEOC mixed case regulations required Kloeckner to choose between two distinct methods of challenging her termination if (as was the case) she contended that the termination was in retaliation for her earlier complaint.[21] First, Kloeckner could immediately appeal her termination to the MSPB, without first pursuing the matter further at the agency level. Second, Kloeckner could file a new discrimination complaint with the Department of Labor challenging that termination. However, the

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[21] 29 C.F.R. § 1614.302(b).

procedures for the agency-level handling of a mixed case discrimination complaint are fundamentally different than the procedures governing a non-mixed case.[22] The agency-level processing is limited to an investigation by the agency itself.[23] Unlike a non-mixed case, there is no hearing before an EEOC judge, no discovery, and no right to appeal the agency's decision to the EEOC. If an employee does file an agency-level complaint regarding a mixed case, any appeal from the agency's decision on a mixed case discrimination complaint is to the MSPB, rather than to the EEOC. Under the EEOC regulations, whichever option an employee exercises first is controlling; once an appeal is filed with the MSPB, the agency itself ordinarily may not entertain a complaint regarding the adverse action that has been appealed to the MSPB.

On August 18, 2006, Kloeckner appealed her termination to the MSPB. Because Kloeckner alleged that her termination was the result of discrimination, that appeal presented a mixed case. The result of this appeal was that two related administrative proceedings, both alleging discrimination, were pending at the same time, one (the mixed case) before the MSPB and the other (the non-mixed case) before the EEOC administrative judge. The issues in the two

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[22] See 29 C.F.R. § 1614.302(d).

[23] In this case the Department of Labor, in its spring 2006 ruling on Kloeckner's earlier retaliation claim, had already rejected her contention (albeit regarding a different period of time) that she was entitled to be treated as on medical leave.

proceedings overlapped to a significant degree, particularly with regard to whether Kloeckner should have been permitted to remain on medical leave. This is a common procedural problem when the events leading to a termination are preceded by other disputed personnel issues that led, prior to the termination, to the filing of a non-mixed complaint. The EEOC and MSPB regulations provide for two separate and independent processes for the non-mixed and mixed case claims. Thus under those regulations in Kloeckner's case both proceedings would have proceeded to a simultaneous period of discovery, separately supervised by the MSPB administrative judge and the EEOC administrative judge.

Counsel for Kloeckner and the agency sensibly recognized that it would be wasteful and cumbersome to engage in overlapping discovery in two different administrative proceedings at the same time. To address that situation, the parties negotiated and filed with the EEOC administrative judge in September 2006 a Joint Motion to Amend Complaint and for Extension of Discovery Deadlines. In that motion Kloeckner asked that her pending complaint be amended to include a challenge to her July 2006 termination. The Department of Labor stated that it did not object to the amendment. The Joint Motion proposed a specific schedule for discovery in the EEOC proceeding, with discovery to be completed by January 2, 2007. Neither the EEOC regulations nor the MSPB regulations provided any authority for an EEOC judge to handle such a mixed case. However,

the EEOC has adopted an informal practice of permitting consideration of a mixed case claim by the EEOC or by an EEOC administrative judge if the issues raised by the mixed case claim are "firmly enmeshed" in a non-mixed case already pending before the EEOC or the EEOC administrative judge.[24]

Although counsel for the parties agreed that the discovery should take place in connection with the EEOC proceeding, they were unable to agree about what should be done regarding the pending MSPB appeal. The MSPB regulations provided no clear method for dealing with this situation.[25] There was, however, precedent in MSPB practice for addressing the need for delay by dismissing an appeal without prejudice for a designated period of time, typically a few months.[26] Kloeckner's counsel chose to proceed in

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[24] See, e.g., *Adkins*, 2012 WL 169813, at *4; *Myvett v. Poteata*, 2011 WL 6122516, at *2 (E.E.O.C. Nov. 21, 2011); *Helsper v. Napolitano*, 2011 WL 281707, at *8 n.2 (E.E.O.C. Jan. 20, 2011).

[25] Because 5 U.S.C. § 7702(a) requires that any mixed case be decided within 120 days, the MSPB could not simply stand idly by while discovery proceeded under the auspices of the EEOC administrative judge. Although the MSPB regulations authorize a stay of proceedings, that stay can last no more than 30 days. 5 C.F.R. § 1201.28(a). The MSPB regulations also permit an appeal to be remanded to the agency which took the adverse action. 5 C.F.R. § 1201.15. But in this case the parties wanted to proceed at the EEOC, not at the Department of Labor.

[26] See, e.g., *Stiles v. Dep't of Homeland Sec.*, 116 M.S.P.R. 263, 269 (2011) (90 days); *Jones v. Dep't of the Navy*, 70 M.S.P.R. 221, 222 (1996) (30 days); *Sheehan v. Dep't of the Army*, 43 M.S.P.R. 204 (1990) (45 days).

that manner, and filed a motion asking the MSPB administrative judge to dismiss the appeal without prejudice for four months, a period that would have lasted past the end of the discovery deadline the parties were proposing to the EEOC administrative law judge.[27] Counsel for the Department of Labor opposed that motion insofar as the proposed dismissal was to be *without* prejudice. In a brief filed after the submission of the joint motion to the EEOC, the Department of Labor apparently contended that if that motion were granted it would constitute an election of remedies that would preclude Kloeckner from thereafter pursuing any appeal to the MSPB, and thus result in a forfeiture of her CSRA claim.[28]

The MSPB administrative judge granted Kloeckner's motion to dismiss her appeal without prejudice for four months. The MSPB judge's order contemplated that the litigation before the EEOC could proceed until the EEOC administrative judge had decided the merits of Kloeckner's challenge to the termination, but still allowed only four months for completion of the EEOC proceedings, until January 18, 2007.[29] The

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[27] Motion to Dismiss Appeal Without Prejudice (Sept. 11, 2006).

[28] Agency's Response to Motion to Dismiss Appellant's Appeal Without Prejudice, at 2 ("The agency believes that this matter should be litigated in only one forum and that once the EEOC grants Appellant's Motion to add the termination to its initially filed case, Appellant's Merit Systems Protection Board case should be completely dismissed.").

[29] "The appeal is DISMISSED without prejudice to the appellant's right to refile her appeal either (A) within 30 days after

(Continued on following page)

order expressly preserved the right of the agency to argue that by presenting her termination claim to the EEOC Kloeckner had forfeited her right to assert a CSRA claim before the MSPB.[30]

The EEOC discovery process did not proceed as speedily as the parties originally contemplated; at the end of December 2006 neither the government nor Kloeckner had yet taken the desired depositions. The parties agreed on an unopposed motion to extend the discovery deadline for completion of discovery at the EEOC. As a result, when the MSPB judge's January 18, 2007 deadline for refiling was reached, the discovery process was still ongoing. If Kloeckner refiled her earlier appeal to the MSPB, such a refiling might have resulted in dismissal of the complaint at the EEOC, because the EEOC's mixed case regulations do not permit a claimant to pursue a mixed case complaint at the agency level if he or she has filed an appeal to the MSPB.[31] On the other hand, the

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a decision is rendered in her EEOC case; or (B) by January 18, 2007 – whichever occurs first." (J.A. 5) (footnote omitted) (underline in original).

[30] "The agency opposes the appellant's motion, arguing the appellant should now elect a forum in which to litigate her removal.... Should the EEOC take jurisdiction over the appellant's removal, the agency may renew its motion to dismiss when the appellant refiles her appeal." (J.A. 4-5 n.1).

[31] Under 29 C.F.R. sections 1614.302(b) and 1614.302(c), an agency is required to dismiss a complaint if the adverse action concerned is the subject of a prior appeal. If Kloeckner in January 2007 had *refiled* an appeal with the MSPB, that would in theory have revived her original August 2006 MSPB appeal,

(Continued on following page)

Department of Labor had already taken the position that by going to the EEOC in September Kloeckner had forfeited her rights to pursue any appeal to the MSPB, a danger that the MSPB judge had made clear still existed. Thus in January 2007, if Kloeckner had refiled her appeal with the MSPB, there was a significant possibility that the Department of Labor could successfully have argued that she had forfeited both her right to seek relief at the agency level (by refiling her appeal) and her right to seek relief from the MSPB (by earlier taking her claim to the EEOC).

The EEOC and MSPB regulations provided Kloeckner with another option. Under sections 1614.302(d)(1)(ii)[32] and 1614.302(d)(3)[33] of the EEOC regulations, and under section 1201.154(a)[34] of the

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which occurred prior to the September 2006 amendment to her EEO complaint.

[32] "If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision."

[33] "At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt...."

[34] "Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision on the appealable action, whichever is later."

MSPB regulations, if Kloeckner continued to pursue her agency-level complaint until there was a Final Agency Decision by the Department of Labor regarding her discrimination complaint, she would at that point have an express right to file an appeal to the MSPB. Kloeckner chose not to refile her appeal in January 2007, and instead opted to pursue her EEO complaint until she received a Final Agency Decision from the Department.

In April 2007, the EEOC judge concluded that Kloeckner had engaged in misconduct in connection with the discovery process, and as a sanction terminated the EEOC proceedings and returned the case to the Department of Labor for a Final Agency Decision.

On October 23, 2007, the Department of Labor issued its Final Agency Decision addressing all three of Kloeckner's claims. The Department's Decision noted that under the EEOC regulations all of the claims then in Kloeckner's complaint, including her earlier hostile environment and retaliation claim, had become part of a single mixed case.[35] The Department rejected Kloeckner's claims that she had been subjected to a discriminatory hostile work environment (J.A. 41), that she had been misclassified as absent without leave (rather than on sick leave) for six

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[35] "At the time the Complainant's termination was added to the issues for review and determination through the EEO process, the Complainant's case became a mixed case.... 29 C.F.R. § 1614.302(a)." (J.A. 15 n.12).

weeks in 2005 in retaliation for her EEO complaint (J.A. 46), and that she had been terminated in retaliation for her EEO complaints. (J.A. 46-47).

The Final Agency Decision issued by the Department of Labor included a "Statement of Notice and Rights" that specifically advised Kloeckner that she could appeal that Decision to the MSPB, citing the EEOC regulation that expressly so provided.

> Your case is a mixed case under 29 C.F.R. § 1614.302(a)(1) ... that can be appealed to the Merit Systems Protection Board (MSPB). Because this case involves a mixed case complaint, if you are dissatisfied with this decision, you may appeal the matter to the MSPB (not the EEOC) within 30 days of receipt of this decision. 29 C.F.R. § 1614.302(d)(1)(ii).[36]

The Decision also advised Kloeckner that "[i]nstead of appealing to the MSPB, you may file a civil action in an appropriate U.S. District Court." (J.A. 49).

This Statement revealed the problem apparently created under the EEOC regulations when Kloeckner earlier amended her non-mixed case complaint to add her mixed case claim regarding her termination. Under the applicable EEOC regulation, a mixed case agency-level complaint can include claims (such as Kloeckner's earlier retaliation claim) that are not

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[36] J.A. 48.

themselves mixed case claims, but are "related to" a mixed case claim.[37] Thus by amending her non-mixed case complaint in September 2006 to include a mixed case claim, the Department concluded, Kloeckner had converted her non-mixed case complaint into a part of a mixed case complaint. Because of that conversion, Kloeckner had inadvertently forfeited the right – or so the Department of Labor insisted – to appeal to the EEOC the Department's rejection of her hostile environment and original retaliation claims, both of which would otherwise have been heard and decided on appeal by the EEOC.

More seriously, the Labor Department's Notice created a dilemma, a problem rooted in the EEOC mixed case regulations. The Notice required Kloeckner to choose between filing suit in district court or appealing to the MSPB. See J.A. 48 ("instead of"). If Kloeckner chose to file suit in district court rather than appealing to the MSPB, she would preserve all of her discrimination claims. But by doing so would necessarily forfeit her CSRA claim, because the CSRA claim could only be raised in an appeal to the MSPB and in litigation filed after an MSPB decision. At this stage a district court lawsuit challenging the Final Agency Decision would be limited to Kloeckner's discrimination claims, and the Department of Labor would not be required – as it would have been on appeal to the MSPB – to establish that

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[37] 29 C.F.R. § 1614.302(a)(1).

its decision to terminate Kloeckner was supported by substantial evidence. On the other hand, if Kloeckner chose to appeal to the MSPB, she would probably forfeit her hostile environment and first retaliation claims. Those original non-mixed case claims fell within the broad EEOC definition of a "mixed case complaint," which governs the scope of complaints at the agency level, because they were "related to" her dismissal claim. However, the EEOC definition of a "mixed case appeal" that can be appealed to the MSPB is limited to the appealable adverse action and a claim that the appealable action was the result of unlawful discrimination.[38] Under the EEOC definition a non-mixed case claim that is merely "related to" a mixed case claim can be part of an agency-level mixed case complaint (as it was in this case), but apparently cannot be part of an appeal to the MSPB. That is consistent with the CSRA itself, which gives the MSPB jurisdiction to consider a claim of discrimination only insofar as it is the asserted basis for an otherwise appealable adverse action. See 5 U.S.C. § 7702(a)(1).[39]

In the circumstances of the instant case there was yet a third problem. The MSPB and EEOC regulations noted above expressly provided that Kloeckner

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[38] 29 C.F.R. § 1614.302(a)(2).

[39] There is considerable uncertainty regarding what the MSPB would regard as within the scope of a mixed case appeal. See Ernest C. Hadley, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE, 1180-84 (2008).

could appeal to the MSPB following a Final Agency Decision. In addition, the Department of Labor itself had told Kloeckner in that Decision that she could appeal to the MSPB. But the September 2006 order of the MSPB administrative judge had set a time limit for "refil[ing]" an appeal. Kloeckner's counsel took the precautionary step of contacting the regional MSPB office about a possible appeal, and was advised by an MSPB official that the MSPB would accept that as a new appeal from the 2007 Final Agency Decision rather than as a refiling of an appeal from the 2006 termination.[40]

Kloeckner appealed the Final Agency Decision to the MSPB. On December 18, 2007, less than two months after the Department of Labor had advised Kloeckner that she could appeal the Final Agency Decision to the MSPB, a lawyer for the Department of Labor[41] filed a motion to dismiss that appeal, arguing that it was precluded by the September 2006 decision of the MSPB judge.

An MSPB administrative judge granted the Department's motion to dismiss.[42] The January 2007

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[40] Stein Declaration (Sept. 7, 2009).

[41] The Final Agency Decision was issued by the Department's Civil Rights Center in Washington, D.C. The motion to dismiss was filed by an attorney in the Department's St. Louis office.

[42] The administrative judge who resolved the 2007 appeal was different than the judge who had acted on the 2006 appeal. See Pet. App. 14a, 16a.

"refil[ing]" deadline, the judge ruled, applied to appeals from a subsequently decided October 2007 Final Agency Decision. The MSPB's regulations specifically provide that a complainant can appeal from a Final Agency Decision "no later than 30 days after the ... date of the appellant's receipt of the agency's decision." 29 C.F.R. § 1201.154(a). The judge held, however, that section 1201.154(a) "does not apply" if a different deadline is imposed by an MSPB judge, so long as the new deadline was established prior to the date on which the complainant initiated a mixed case complaint with the employing agency or the EEOC. Thus in the instant case the appeal right in section 1201.154(a) was inapplicable because "the re-filing deadline was established [on September 18, 2006], ... *before* the removal action was merged into the appellant's EEO complaint [on September 19, 2006]." (J.A. 54) (emphasis added). The administrative judge did not explain why the applicability of the regulation was affected by whether in September 2006 the order of the MSPB judge had been issued before rather than after the order of the EEOC judge.

The judge also held that the Department of Labor could challenge Kloeckner's right to appeal to the MSPB even though the Department had informed Kloeckner only two months earlier that she could pursue just such an appeal. "It is well settled that an erroneous notice of appeal rights does not create a right of appeal where one would not otherwise exist." (J.A. 55). As the phrase "well settled" makes clear,

erroneous notices about appeal rights are a recurring problem in this area of the law.

At this point in the mixed case process there were still four more levels of possible administrative proceedings. Kloeckner could have petitioned the MSPB to review the decision of the MSPB judge. If the MSPB rejected that petition, Kloeckner could have appealed the decision of the MSPB to the EEOC. If the EEOC acted favorably on such an appeal, Kloeckner could then urge the MSPB to accept the conclusion of the EEOC. If the MSPB disagreed with the EEOC, Kloeckner could have asked that a Special Panel be convened to resolve the differences between the MSPB and the EEOC. 5 U.S.C. § 7702(b)-(d). Having already consumed almost three years in the administrative process, Kloeckner decided not to pursue these additional steps. The CSRA expressly permitted Kloeckner to file suit at that juncture without doing so.

When Kloeckner did not seek review of this order, the decision of the judge became the decision of the MSPB on April 2, 2008. By that time Kloeckner's discrimination complaints had been pending within the administrative process – at either the Department of Labor, the EEOC, or the MSPB – for a total of 1,012 days.

Proceedings In The Courts Below

Kloeckner commenced this action in United States District Court,[43] alleging discrimination on the basis of age, gender and disability,[44] and in retaliation for having filed complaints with the Department of Labor.

The District Court dismissed Kloeckner's complaint for lack of jurisdiction. Relying on the Federal Circuit decision in *Ballentine v. Merit Systems Protection Board*, 738 F.2d 1244 (Fed. Cir. 1984), the District Court held that in mixed cases "petitions to review the [MSPB's] final decisions must be filed in the Court of Appeals for the Federal Circuit unless the Board has decided discrimination issues on the merits." (Pet. App. 20a).

The Court of Appeals affirmed. The circuit court noted that the underlying statutory scheme is complex (Pet. App. 2a), and that it is "far from clear" whether the Federal Circuit, rather than the district courts, has jurisdiction over mixed cases which the MSPB has decided on procedural or jurisdictional grounds, rather than on the merits. (Pet. App. 9a). The Eighth Circuit nonetheless concluded that only

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[43] The complaint was originally filed in the District Court for the District of Columbia. That court granted the government's motion for a change of venue, transferring the case to the District Court for the Eastern District of Missouri.

[44] When her case was pending before the EEOC judge, Kloeckner had unsuccessfully sought to amend her complaint to include an allegation of discrimination on the basis of disability.

the Federal Circuit has jurisdiction over mixed cases in which there has been no merits decision by the MSPB. In doing so, the Court of Appeals deferred to the Federal Circuit's decision in *Ballentine*. Both courts below noted that there is a circuit split on this jurisdictional question. (Pet. App. 7a-8a, 20a n.6).

SUMMARY OF ARGUMENT

(1) District courts have jurisdiction over all claims decided by the MSPB that involve "[c]ases of discrimination subject to the provisions of [5 U.S.C.] section 7702." 5 U.S.C. § 7703(b)(2). As the text of section 7702 makes plain, an employee's case is "subject to" section 7702 if it satisfies two criteria: (1) the case involves an employment action (such as a termination) that could be appealed to the MSPB and (2) the employee "alleges that a basis for the action was discrimination prohibited by" Title VII or the ADEA. 5 U.S.C. § 7702(a)(1). Because Kloeckner alleged that her termination was based on unlawful discrimination, her case falls squarely within the jurisdiction of the district court under section 7703(b)(2).

Contrary to the decisions below, a case in which the employee "alleges" discrimination is "subject to" section 7702 regardless of whether the MSPB decides the discrimination claim on the merits or on some other ground. Section 7702(a)(1) requires only that the claimant "alleges" that the adverse action was

based on unlawful discrimination and makes no reference to how the MSPB resolved that allegation. Moreover, "subject to" section 7702 cannot be limited to cases which the MSPB has decided on the merits, because certain provisions of section 7702 apply to cases that the MSPB has not decided at all. Section 7702(e)(1)(B), for example, authorizes an employee to file suit in district court whenever the MSPB *fails* to decide an appeal involving an allegation of discrimination within 120 days after the employee filed that appeal.

(2) Section 7703(b)(2) requires that "[c]ases of discrimination subject to the provisions of section 7702" must be filed within 30 days after notice of final action by the employing agency. Except when section 7703(b)(2) applies, the period of limitations for filing a mixed case claim would exceed 30 days; the applicable limitation period would vary depending on the antidiscrimination statute a plaintiff sought to enforce.

The government has consistently argued that Kloeckner's ADEA action is subject to the 30-day limitation period, and that Kloeckner's lawsuit thus can proceed only as a challenge to the MSPB's decision, which became final less than a month before the suit was filed. The government cannot have it both ways. If the 30-day limitation period in the second sentence of section 7703(b)(2) applies to Kloeckner's claim, then the jurisdictional provision in the first sentence of section 7703(b)(2) must apply to that claim as well.

(3) Requiring that a mixed case be filed in the Federal Circuit, rather than in district court, would alter the legal standard governing the litigation.

If a mixed case were pursued in the Federal Circuit, that proceeding would have to be a "petition to review [the] decision of the [MSPB]." 5 U.S.C. § 7703(b)(1). Thus if the MSPB had dismissed a mixed case on a procedural or jurisdictional basis, the Federal Circuit would consider only whether the MSPB's decision should be overturned on the ground, for example, that it was arbitrary or unsupported by substantial evidence.

In district court, on the other hand, the complaint would ordinarily assert the underlying discrimination claim, rather than asking for review of any decision by the MSPB. The fact that the MSPB might have rejected the discrimination claim on procedural or jurisdictional grounds would ordinarily be relevant only if the defendant sought to dismiss the action for failure to exhaust administrative remedies. But what steps a plaintiff must take to exhaust administrative remedies is governed by the fixed and narrow exhaustion requirements set out, for example, in Title VII or the ADEA, not by the complex and evolving practices and procedures of the MSPB.

The statutory exhaustion requirements are limited and specific. Title VII generally requires only that a claimant file a timely complaint and wait a specified period of time, typically 120 days, before filing suit. The ADEA requires somewhat less. Forcing a

claimant to seek relief in the Federal Circuit, rather than in district court, would mean that the MSPB's dismissal of mixed case could be upheld – and the underlying discrimination claim rejected – even though the plaintiff had done all that the statutory exhaustion provisions demanded.

ARGUMENT

I. The Terms Of Sections 7702 And 7703 Clearly Provide That All Mixed Case Claims Must Be Filed In District Court

Whether the Federal Circuit or a district court has jurisdiction[45] over this case turns on the interrelationship of three provisions of the Civil Service Reform Act. Section 7703(b)(2) provides that "[c]ases of discrimination subject to the provisions of section 7702" are to be filed in federal district court. Under section 7702(a), all mixed cases are cases of discrimination "subject to" section 7702. Section 7703(b)(1) precludes Federal Circuit jurisdiction over any case

[45] District courts would ordinarily have subject matter jurisdiction over a claim arising under Title VII or the ADEA. 28 U.S.C. § 1331. However, section 1295(a)(9) of Title 28 gives the Federal Circuit exclusive jurisdiction over "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to section[ ] 7703(b)(1)." Thus a district court would only have jurisdiction over a Title VII or ADEA claim decided by the MSPB if that claim fell within the scope of the section 7703(b)(2) exception to section 7703(b)(1).

within the scope of section 7703(b)(2). Read together, these three provisions make clear that all mixed cases are to be heard in district court and not in the Federal Circuit.

(1) The cases over which district courts have jurisdiction following a decision by the MSPB are delineated by section 7703(b)(2).

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 ... , section 15(c) of the Age Discrimination in Employment Act ... , and section 16(b) of the Fair Labor Standards Act ... , as applicable.

Each of the referenced anti-discrimination statutes provides that an action under that law may be filed in federal district court.[46] A case that falls within the scope of section 7703(b)(2) may not be brought in the Federal Circuit. Section 7703(b)(1) provides for Federal Circuit jurisdiction to review final decisions or orders of the MSPB "[e]xcept as provided in paragraph (2) of this subsection."

Section 7702(a)(1) specifies that cases of discrimination are "subject to" section 7702 when two criteria are satisfied: (1) the employee must have been "affected by an action which the employee or applicant

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[46] 42 U.S.C. § 2000e-5(f)(3); 29 U.S.C. § 633a(c); 29 U.S.C. § 216(b).

may appeal to the Merit Systems Protection Board" and (2) the employee must "allege[ ] that a basis for the action was discrimination prohibited by" certain listed provisions, including certain provisions of Title VII and the Age Discrimination in Employment Act. 5 U.S.C. § 7702(a)(1). Section 7702(a)(1) also provides that cases that satisfy those criteria must be decided by the MSPB within 120 days. The balance of section 7702 expressly refers to the types of cases delineated by section 7702(a)(1).[47] The section 7702(a)(1) criteria are the very standard that defines a mixed case, because the purpose of section 7702 was to regulate mixed cases.[48]

The "cases of discrimination subject to the provisions of section 7702" are not limited to cases in which discrimination actually occurred, or in which

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[47] Subsection 7702(a)(2) applies to matters that involve both "any action described in paragraph (1)(A)" and "any issue of discrimination prohibited under any provision of law described in paragraph (1)(B)." Subsection 7702(a)(3) concerns decisions of the MSPB "under paragraph (1)." Subsection 7702(b)(1) governs decisions of the MSPB "under subsection (b)(1)." The rest of subsection 7702(b) as well as subsection 7702(c) and 7702(d) deal with the procedures to be followed subsequent to an MSPB decision as delineated by section 7702(b)(1). Several subsections of section 7702(e) refer to decisions of the MSPB under subsection (a)(1) and agency decisions within the scope of subsection (a)(2), which in turn refers to subsections 7702(a)(1)(A) and 7702(a)(1)(B).

[48] The conclusion that all mixed cases are "subject to" section 7702 is supported by the title of that provision, "Actions involving discrimination." 92 Stat. 1140.

the MSPB has arrived at any conclusion about the merits of the discrimination claim. All section 7702(a)(1) requires is that the employee "alleges" that discrimination was a basis of the appealable action. Under the MSPB regulations it is the existence of an *allegation* of discrimination that renders an appeal subject to section 7702. The MSPB rules that "implement 5 U.S.C. 7702" are denoted the "Procedures for Cases Involving Allegations of Discrimination." Those rules "apply to any case in which an employee ... alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination." 29 C.F.R. § 1205.151(a)(1).

The cases of discrimination "subject to" section 7702 cannot be limited to cases in which the MSPB has reached some conclusion as to the merits of the discrimination claim, because several provisions of section 7702 clearly apply to claims *before* the MSPB has acted at all. Subsection 7702(a)(2) governs the manner in which an agency must handle a mixed case prior to any appeal to the MSPB. Section 7702(e)(2) authorizes an employee to appeal to the MSPB if an agency fails to act on a mixed case within 120 days. Subsection 7702(a)(1) establishes the deadline by which the MSPB must decide a mixed case; it governs how the MSPB is to act (quickly enough to finish its work within 120 days) prior to the issuance of any decision. Section 7702(e)(1)(B) authorizes a claimant to file suit if the MSPB has failed to act on a mixed case for more than 120 days. In addition, several provisions govern cases which will

never come before the MSPB at all. Subsection 7702(a)(2) provides that an employee may file suit once an agency has decided a mixed case. Subsection 7702(e)(1)(A) provides that such a suit may be filed if an agency has failed to resolve a mixed case within 120 days of the day on which it was filed.

Subsection 7703(b)(2) refers without limitation to all "[c]ases of discrimination subject to ... section 7702." Elsewhere in sections 7702 and 7703, Congress did limit the reach of particular subsections to mixed cases that had been resolved on a particular basis. Section 7703(a)(2) refers to cases in which the employee "seeks review of a final order or decision on the merits." Similarly, subsection 7702(b)(3)(B)(ii) refers to MSPB decisions "involving" one of the anti-discrimination prohibitions in subsection 7702(a)(1)(B), an express limitation that would exclude some but not all procedural and jurisdictional decisions by the MSPB. If Congress had intended to impose a similar limitation on section 7703(b)(2), it surely would also have done so expressly.

(2) The phrase "cases of discrimination subject to the provisions of section 7702" in section 7703(b)(2) governs not only which court has jurisdiction over mixed cases, but also the limitations period for such actions. If, as the government argues, there is a category of mixed cases to which the section 7703(b)(2) jurisdictional provision does not apply, those cases also would not be within the scope of the section 7703(b)(2) limitations period provision.

The second sentence in section 7703(b)(2) establishes a statute of limitations for certain cases brought under Title VII, the ADEA, and the Fair Labor Standards Act. The provision applies to suits filed in district court; actions filed in the Federal Circuit are subject to a separate 60-day limitations period established by section 7703(b)(1). Referring to the "cases of discrimination" that are the subject of the first sentence in section 7703(b)(2), the second sentence provides:

> Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

If, as we urge, "any such case" – i.e., "cases of discrimination subject to the provisions of section 7702" – means all mixed cases, then the second sentence of section 7703(b)(2) would also apply to all mixed cases.

If, however, the phrase "cases of discrimination subject to the provisions of section 7702" excludes certain types of mixed cases, the limitations provision in the second sentence would necessarily be inapplicable as well to that same category of cases. *Ballentine*, for example, holds that the only mixed cases covered by the first sentence of section 7703(b)(2) are those in which the MSPB has addressed the merits of the discrimination claim. If that is the meaning of the phrase "cases of discrimination subject to the provisions of section 7702," the limitations

period established by the second sentence of that section would not apply to actions filed after an agency decision regarding a mixed case, because agency decisions virtually never occur after the MSPB has reached the merits of the discrimination claim.

Absent the application of the section 7702(b)(2) 30-day limitations period, the applicable limitations period would vary. Under section 717(c) of Title VII, a civil action must be filed 90 days after the final decision of the agency. 42 U.S.C. § 2000e-16(c). It is unclear what limitations period would otherwise govern an ADEA claim by a federal employee. The lower courts generally agree the period would be more than 30 days, but the circuits are divided about what the limitation period should be.[49] A claim under the equal pay provisions of the Fair Labor Standards Act would be subject to a limitations period of at least two years. See 29 C.F.R. § 1614.408.

The government contends that Kloeckner's claim – because it did not involve (or occur after) a decision on the merits – is not a "case[] of discrimination subject to the provisions of section 7702" and thus cannot be filed in district court under section 7703(b)(2). But if Kloeckner's claim is not a "case[] of

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[49] *Price v. Bernanke*, 470 F.3d 384, 388 (D.C. Cir. 2006) (90 day period in non-mixed case); *Burzynski v. Cohen*, 264 F.3d 611, 619 (6th Cir. 2001) (90 day period in non-mixed case); *Lubniewski v. Lehman*, 891 F.2d 216, 221 (9th Cir. 1989) (six year period).

discrimination subject to the provisions of section 7702," the 30-day limitation period in section 7703(b)(2) also would be inapplicable to Kloeckner's claim.

The government, however, has repeatedly insisted that Kloeckner's claim is indeed controlled by the 30-day limitation period in section 7703(b)(2). The Final Agency Decision, citing an EEOC regulation, advised Kloeckner that "[i]nstead of appealing to the MSPB, you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of this decision." (J.A. 49). In its district court briefs, the government repeatedly argued that Kloeckner's lawsuit was governed by the 30-day limitation period.[50]

The government cannot have it both ways. If the 30-day limitations period in the second sentence in section 7703(b)(2) applies to Kloeckner's claim, the jurisdictional provision in the first sentence of section 7703(b)(2) must apply to Kloeckner's claim as well.

(3) A literal reading of section 7703(b)(2) is supported by the language of section 7703(b)(1). The

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[50] Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss to Transfer for Improper Venue, pp. 4, 10; Defendant's Reply in Further Support of Her Motion to Dismiss or, in the Alternative, to Transfer for Improper Venue, p. 6; Defendant's Memorandum in Support of Her Motion to Dismiss, or in the Alternative, for Summary Judgment, pp. 4, 13; Defendant's Reply in Support of Her Motion to Dismiss, or in the Alternative, for Summary Judgment, p. 2.

Federal Circuit does not have jurisdiction over all litigation that arises subsequent to a decision of the MSPB. Rather (subject to the exception in section 7703(b)(2)), that court of appeals is authorized to hear only "a petition to review a final order or final decision of the Board." An action challenging the MSPB's disposition of a CSRA claim involving no claim of discrimination would necessarily be a request that the court "review a final order or final decision of the Board," and thus within the jurisdiction of the Federal Circuit, because the sole circumstance in which a federal court is authorized to consider such a CSRA claim is by reviewing such an MSPB order or decision, the type of judicial action provided by section 7703(a).

But when a claimant seeks to pursue a claim for discrimination under Title VII or the ADEA, the plaintiff is not (at least usually) seeking "review [of] a final order or final decision of the Board." Rather, the plaintiff is challenging the underlying employment action of the agency, and is asserting the same statutory cause of action for discrimination that he or she would have raised had that discrimination lawsuit been filed without ever appealing to the MSPB at all, or (after waiting 120 days) without awaiting a final decision by the MSPB. The complaint in this case is not a request that the district court review the decision of the MSPB. The complaint seeks vindication only of Kloeckner's discrimination claims, and does not raise her CSRA claim. (J.A. 61-70).

To be sure, in some mixed case actions the government may choose to assert as an affirmative defense a contention that the plaintiff failed to satisfy a requirement that he or she exhaust administrative remedies. But what tack the defendant will take cannot be known when the action is first commenced; the government may decide for tactical reasons not to raise the issue of exhaustion, or might simply postpone doing so for so long as to waive the issue. If the government does assert that affirmative defense in a timely manner, it might in support of that defense refer to the basis of the MSPB's decision. But the fact that the defendant at some later point in the proceeding invokes the decision of the MSPB in support of an affirmative defense assuredly does not convert the earlier filed complaint into a petition for review of that decision. Because the instant complaint cannot fairly be characterized as a "petition to review a final order or final decision of the Board," and the Federal Circuit thus could not have jurisdiction to hear this proceeding, it must be within the jurisdiction of the district court.

(4) A requirement that some mixed cases (however delineated) be filed in the Federal Circuit, rather than in district court, would in certain circumstances conflict with the express statutory guaranties of a trial de novo. Section 7703(c) provides that "in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the

reviewing court."[51] Section 7702(e)(3) provides that "[n]othing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section...." These provisions codified this Court's decision in *Chandler v. Roudebush*, 425 U.S. 840 (1976), that federal employees who file suit under Title VII are entitled to a de novo determination of disputed issues of fact, and are not limited to review on the administrative record. Title VII, *Chandler* held, allows federal employees "judicial trials rather than 'substantial evidence' review of administrative disposition of their discrimination claims." 425 U.S. at 858.

In discrimination cases, factual disputes will most often concern the merits of the underlying claims. But factual disputes can also arise with regard to procedural or jurisdictional issues. For example, the applicable EEOC regulations require an aggrieved federal employee to contact a Counselor within 45 days of the effective date of the alleged discriminatory action, unless the employee did not have actual or constructive knowledge that the action had occurred, or had not been notified of the time limit. 29 C.F.R. § 1614.105(a). In determining whether a charging

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[51] This provision appears in an apparently incongruous context, at the end of a subsection that now refers to review of cases filed in the Federal Circuit. However, the original language of this section concerned cases filed in the Court of Claims. 92 Stat. 1143. The de novo provision referred to the Court of Claims, which, unlike the courts of appeals, does take evidence and conduct evidentiary hearings.

party acted within this limitation period, questions of fact could arise regarding when the employee contacted a Counselor, about whether the employee had been told of the deadline established by the regulation, or concerning whether the employee was initially unaware that the disputed action had occurred. In the course of the administrative proceedings the agency or the MSPB might resolve one or more of those factual disputes adversely to the employee, and conclude that his or her claim was thus time-barred. Under *Chandler*, however, the employee would clearly be entitled to a de novo determination of such a factual issue. Sections 7702(e)(2) and 7703(c) make clear that Congress did not intend to alter that right; if such a determination were made by the agency and the employee then filed suit in district court, there is no question that the plaintiff would have a right to a judicial trial of the question and would not be limited to the evidence in the administrative record. If, however, any category of mixed cases must be filed in the Federal Circuit, no such trial de novo would be possible on those cases. The Federal Circuit cannot conduct an evidentiary hearing at which to receive evidence not already in the administrative record or assess the credibility of witnesses. If, for example, an employee and a Counselor disagreed about the date on which the employee had contacted the Counselor, and an administrative judge decided to believe the Counselor, a district judge (or jury) would hear those witnesses and decide which was more credible; the Federal Circuit would have no way of doing so. If the MSPB had decided those

factual issues adversely to the former employee, the Federal Circuit would be unable to accord the plaintiff the de novo trial to which he or she would be entitled under *Chandler* and section 7702(e)(2).

In some circumstances, moreover, it will be impossible to know when a case is first filed whether it will turn ultimately on such factual questions. Even if the MSPB did resolve factual issues in rejecting a plaintiff's claim, it is possible that the subsequent lawsuit might be decided without regard to the correctness of those factual determinations. Conversely, in a case which the MSPB decided without addressing any factual disputes, a court might subsequently conclude that some disputed factual issue was of controlling importance.[52] If the question of whether a district court or the Federal Circuit had jurisdiction over a mixed case turned on whether a case presented a factual issue requiring de novo (in some instances

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[52] In this case, for example, the plaintiff contends that her counsel, prior to deciding to appeal to the MSPB rather than file suit, telephoned the regional MSPB office and was assured by a responsible Board official that the appeal to the MSPB would be permitted. (See n.40, *supra*). In later rejecting that appeal, the administrative judge apparently believed that it was irrelevant as a matter of law whether plaintiff's counsel had been given and relied on that representation, and thus did not decide whether the events described by plaintiff's counsel had occurred. If, however, a court were ultimately to conclude that the existence of such a representation was in fact legally relevant, it could only determine whether the representation had been made by conducting an evidentiary hearing, something that the Federal Circuit could not do.

nisi prius) determination, neither the Federal Circuit nor a district court could be certain at the outset whether it had (or would retain) jurisdiction, and claimants would be required to predict – possibly at their peril – the effect of future litigation developments on the jurisdiction of the court where they initially filed suit.

II. Requiring That Any Mixed Case Be Filed In The Federal Circuit Would Be Inconsistent With Other Provisions Of The CSRA And The Applicable Antidiscrimination Statutes

(1) Requiring that any mixed cases be filed in the Federal Circuit would be inconsistent with the provisions of Title VII and the ADEA, both of which provide that all actions under those statutes may be filed in district court.

Section 706(f)(3) of Title VII provides that "Each United States district court ... shall have jurisdiction of actions brought under this title." 42 U.S.C. § 2000e-5(f)(3). The provisions of section 706 are made applicable to claims by federal employees by section 717(c). 42 U.S.C. § 2000e-16(c). Section 633a(c) of the ADEA, which specifically governs claims by federal workers, provides that "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 633a(c). There is no question that prior to the enactment of the CSRA all Title VII and ADEA

actions by federal employees could have been brought in district court, including actions commenced following a decision by the Civil Service Commission (the predecessor to the MSPB) resolving a Title VII or ADEA administrative complaint.

Nothing in the CSRA indicates any intention to partially repeal section 706(f)(3) and 633a(c) by stripping district courts of the jurisdiction that they had previously exercised over all Title VII and ADEA actions. The language of section 7703(b) reflects instead an intent that that provision leave unaltered district court jurisdiction that already existed under those antidiscrimination statutes. The second sentences of sections 7703(b)(1) and 7703(b)(2), both of which concern the limitations periods for certain actions, begin with the words "[n]otwithstanding any other provision of law." Congress clearly understood that these new limitations periods differed from existing law, and specifically provided that where such differences existed section 7703(b) would control. The absence of such prefatory language in the first sentences of section 7703(b)(1) (regarding the Federal Circuit) and 7703(b)(2) (regarding cases of discrimination) is persuasive evidence that Congress did not intend those provisions to alter existing law. Given the manifest importance attached to the right to proceed in district court, Congress could not have intended to repeal by implication the well-established right to proceed in district court. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a

contrary legislative intent should the courts restrict access to judicial review").

(2) Interpreting the phrase "cases of discrimination subject to section 7702" to exclude some mixed cases would have a number of incongruous results.

First, such a narrow interpretation of section 7703(b)(2) would mean that different federal courts could have jurisdiction over the same procedural question, depending on whether that question was decided by the agency or the MSPB. Mixed case complaints filed with an agency are subject to several timeliness requirements. If the agency rejects a complaint on the ground that one of these deadlines was not satisfied and the complainant files suit following the agency's decision, that action must be in district court, not the Federal Circuit, because *all* actions filed following an agency decision, no matter what the basis of that decision, must be commenced in district court. A complainant aggrieved by the agency dismissal of a claim on timeliness grounds might appeal to the MSPB rather than initially filing suit. If the MSPB agreed with the decision of the agency, thus ruling against the worker on that same procedural ground, the employee would again have the right to seek judicial relief. Under the decision below, that dispute about the timeliness of the employee's complaint in the agency proceedings, if resolved by the MSPB, would have to be heard in the Federal Circuit, rather than in the district court which would have heard the issue if the employee had filed suit after the initial agency decision.

Second, any such limitation on the right to go to district court following a decision of the MSPB might not apply if the complainant appealed that decision to the EEOC or the Special Panel. Section 7702(e)(1)(C) provides that an employee who initiates such an appeal may file suit in district court – challenging the MSPB decision in question – if that appeal has not been finally resolved within 180 days by the EEOC, the MSPB, and the Special Panel.

Third, whether a claimant who appealed to the MSPB could file suit in district court, rather than having to seek review in the Federal Circuit, would depend on the timing of the MSPB decision. An employee who has filed a mixed case appeal to the MSPB may seek judicial relief in two circumstances. First, the complainant may wait until the MSPB has decided the appeal and then file suit. 5 U.S.C. § 7702(a)(3). In that case, the court below held, some mixed cases must be heard in the Federal Circuit. Second, under section 7702(e)(1)(B) a complainant also has a right to go to court prior to any MSPB decision "if at any time after ... the 120th day following the filing of such an appeal with the [MSPB] under subsection (a)(1) of this section, there is no judicially reviewable action." An action filed under section 7702(e)(1) would necessarily be in district court because that section provides that if the 120 day deadline is not met the employee "shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 ... [or] section 15(c) of the

Age Discrimination in Employment Act...." The right established by section 7702(e)(1) to proceed in district court is not extinguished if, after or even before suit is filed under that provision, the MSPB issues a decision. The section 7702(e)(1) right to sue in federal court arises if at "*any*" time after the 180 day period there is no judicially reviewable action. The section 7702(e)(1) right to sue in district court exists "[n]otwithstanding any other provision of law"; thus even if section 7703(b) provided for Federal Circuit review for some category of mixed cases decided by the MSPB, an employee would still have a right under section 7702(e)(1) to file suit in district court if the MSPB had not decided the case within the requisite 120 days. Thus the happenstance of the timing of a MSPB decision would determine whether an employee would have a right under section 7702(e)(1) to file suit in district court.

(3) The legislative history of sections 7702 and 7703 supports the conclusion that section 7703(b)(2) confers on district courts jurisdiction over all mixed cases.

Prior to 1978, appeals from agency determinations in Title VII cases were taken to the Civil Service Commission. Section 717(c) provided without exception that civil actions after a Civil Service Commission decision were to be filed as provided in section 706, which authorizes suits under Title VII to be filed in district court. 42 U.S.C. §§ 2000e-16(c), 2000e-5(f)(3). From the beginning of the legislative process, the proposals that became the Civil Service Reform

Act of 1978 provided that the Civil Service Commission would be replaced by the MSPB; that change necessitated the inclusion of some provision to delineate the court which would hear discrimination claims from the newly created MSPB. Congress clearly intended that district courts would continue to hear such cases.

In the Senate bill as originally introduced, the predecessor to section 7703(b)(2) dealt only with Title VII and the ADEA. It provided that a petition to review a decision of the MSPB was to be filed in a court of appeals or the Court of Claims, "except for actions filed in the United States district courts under section 717(c) [of Title VII] [or] under section 15 of the Age Discrimination in Employment Act."[53] The bill subsequently reported by the Senate Committee and passed by the Senate contained a provision, then section 7701(h) (the predecessor of 7702), which addressed consideration by the MSPB of mixed cases that referred to Title VII and three other specified statutes. In the accompanying jurisdictional provision (the predecessor of section 7703), rather than again listing those statutes, the bill referred back to that earlier section, providing that the exception (from review in the courts of appeals or the Court of Claims) was for "actions filed in the United States

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[53] 2 Legislative History of the Civil Service Reform Act of 1978, Committee Print No. 96-2, 96th Cong., 1st Sess., at 1332 ("Legislative History").

district courts pursuant to the anti-discrimination laws referred to in section 7701(h)."[54]

The Senate Committee Report explained that under the predecessor of section 7703(b)(1) the courts of appeals were limited to reviewing MSPB decisions "other than those involving discrimination complaints."[55] The Report explained why it was desirable that district courts hear claims arising under federal anti-discrimination statutes.

> District court is a more appropriate place than the Court of Appeals for these cases since they may involve additional fact-finding. Furthermore, discrimination complaints involving employees outside the Federal government are now considered by U.S. District Courts. To encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court. The section therefore exempts from the general requirement that employees appeal to the Court of Appeals or Court of Claims those suits brought pursuant to the anti-discrimination laws.[56]

It is clear that under the bill originally passed by the Senate all mixed cases could have been heard in district court.

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[54] *Id.* at 1393-95.

[55] S. Rep. No. 95-969, at 63, *reprinted in* 2 Legislative History, at 1527.

[56] *Id.*

The language now in section 7703(b)(2) was framed by the Conference Committee, which substituted the reference to "cases of discrimination subject to section 7702" for the earlier language regarding the laws "referred to" in the predecessor of section 7702. Nothing in the Conference Committee report suggests that the Committee intended this slight rephrasing to exclude from district court any of the mixed cases covered by the earlier Senate-passed bill, or by the original 1972 provisions of Title VII. The Joint Explanatory Statement of the Conference Committee emphasized that the legislation preserved access to district court, stressing that "[t]here are in all eight different times when the employee may have the right to bring suit in Federal district court."[57] One of the listed times was "30 days after an MSPB decision." The unequivocal statement that suit could be filed in district court "after an MSPB decision" allowed of no implied exception. In the CSRA, Congress actually took steps to increase access to district court in Title VII cases, reducing from 180 to 120 days the period of time after which an employee could sue in district court without awaiting a final decision from the agency or on appeal (formerly to the Civil Service Commission, now to the MSPB). *Compare* 42 U.S.C. § 2000e-16(c) *with* 5 U.S.C. § 7702(e).

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[57] Conf. Rep. No. 95-1717 at 141 (1978), *reprinted in* 2 Legislative History, at 55 1983.

(4) In regulations adopted close in time to the enactment of the CSRA, both the MSPB and the EEOC adopted regulations which provided that following an MSPB decision regarding a mixed case judicial relief was to be sought in district court. The sole reference to the Federal Circuit is in an MSPB regulation noting that an employee who had raised a mixed case at the MSPB may only obtain review by the Federal Circuit by expressly waiving his or her discrimination claim.

The CSRA became effective on January 11, 1979. Eight days later, on January 19, 1979, the newly created MSPB issued its first regulations. Then section 1201.155, in a subpart entitled "Procedures for Cases Alleging Discrimination," provided that "[t]he Board shall notify an appellant under this subpart of his/her right ... within 30 days after notice of the decision by the Board ... to file a civil action in an appropriate U.S. District Court." 44 Fed. Reg. 3,954 (Jan. 19, 1979). Two months later the MSPB issued a somewhat expanded set of regulations; the notice provision provided that "[a]ny final decision of the Board shall notify the appellant of his/her rights ... to file a civil action in an appropriate United States District Court." 44 Fed. Reg. 17,968, 17,977 (Mar. 23, 1979). In June 1979, the MSPB's regulations were again revised. In addition to the notice provision, it contained a new provision entitled "Judicial review of cases decided under 5 U.S.C. § 7702." That provision (then section 1201.173) stated:

> *Place and type of review.* *All* judicial review from cases decided under 5 U.S.C. § 7702 is in the appropriate United States district court, including: an action pursuant to the provisions of section 171(c) of [Title VII] [and] section 15(c) of the Age Discrimination in Employment Act....

44 Fed. Reg. 38,342, 38,360 (June 29, 1979) (emphasis added). The MSPB explained that such mixed cases were heard in a different judicial forum than CSRA cases that did not involve discrimination claims.

> This section has been added to the regulations to set out the general provisions relating to judicial review of proceedings under 5 U.S.C. § 7702 cases. Unlike the cases decided under 5 U.S.C. § 7701, review lies in the appropriate United States district court....

44 Fed. Reg. 38,248-49 (June 29, 1979). Both of these provisions reflected the MSPB's clear contemporaneous understanding that review of any mixed case decision was to be in district court, not in a court of appeals.[58]

In 1989 the MSPB revised these regulations in a manner that made even more emphatic this same conclusion. The MSPB added to the notice provision a sentence explaining the only circumstance in which

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[58] The brief quoted at p. 10 of the Cert. Reply Brief was filed in *Ballentine* by the MSPB.

an employee who had asserted a mixed case before the Board could obtain review in the Federal Circuit. "If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in § 1201.119...." 54 Fed. Reg. 53,500, 53,519 (Dec. 29, 1989). These notice and judicial review provisions are now codified in 5 C.F.R. §§ 1201.157 and 1201.175.

In 1979 the EEOC assumed the authority previously exercised by the Civil Service Commission to issue regulations regarding discrimination complaints by federal employees. In July 1980 the EEOC issued its first set of regulations. Consistent with the MSPB regulations issued the previous year, the EEOC regulations provided that

> [a]n individual who has a complaint processed pursuant to 5 CFR 1201.151 et seq. and these regulations is authorized by 5 U.S.C. 7702 to file a civil action based on the decision of the Merit Systems Protection Board in an appropriate U.S. District Court.

45 Fed. Reg. 50,326, 50,328 (July 29, 1980) (section 1613.417). That provision is now codified in 29 C.F.R. § 1614.310.

III. Requiring The Litigation Of Any Mixed Case In The Federal Circuit Would Be Inconsistent With The Specific Exhaustion Regime Established By The ADEA, Title VII And The CSRA

The Question Presented in this case governs not merely which federal court has jurisdiction to hear mixed claims, but also – and potentially more importantly – the substantive standard to be applied in resolving that litigation. In the Federal Circuit the issue which the court is called upon to decide, and the standard governing the resolution of that question, can both be categorically different from the issue and standard that would be involved if the same case were filed in district court. At times those differences will be outcome-determinative. A requirement that certain mixed cases be filed in the Federal Circuit, rather than in district court, would be inconsistent with the specific exhaustion regime established for mixed cases by the ADEA, Title VII, and the CSRA.

(1) If a mixed case is filed in the Federal Circuit following a decision by the MSPB, the issue before the court of appeals is a narrow one. The subject matter of that appeal is limited to a "petition to review a final order or final decision of the Board." 5 U.S.C. § 7703(b)(1). The possible dispositions in the Federal Circuit are restricted to upholding or "hold[ing] unlawful and set[ting] aside any agency action, findings, or conclusions." 5 U.S.C. § 7703(c). Thus if the MSPB rejects a mixed case on procedural or jurisdictional grounds, the Federal Circuit may consider only

whether the MSPB's action was arbitrary, unsupported by substantial evidence, or within certain other limited grounds for reversal set out in section 7703(c). If the Federal Circuit, applying this deferential standard, does not overturn the MSPB's action, the petition for review and the mixed case claim necessarily fail. In the Federal Circuit, any procedural or jurisdictional misstep in connection with an MSPB proceeding that warrants termination of the MSPB process short of a merits decision is automatically fatal to the claim.

If, on the other hand, a mixed case is filed in a district court, the governing issues concerning the discrimination claim[59] – and thus the relevant legal standards – are necessarily different. A proceeding in a district court is not a request for "review" of an MSPB decision; it is an ordinary civil action under the relevant federal antidiscrimination statute. Section 7703(b)(2) provides that such an action is "filed under" the ADEA, Title VII, or the Fair Labor Standards Act. The complaint in such an action need not ask the federal court to review or consider in any way the prior action of the MSPB. Rather, a district court discrimination complaint may simply allege that the

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[59] If a mixed case claim is filed in district court following a decision of the MSPB and the plaintiff seeks review of the Board's disposition of his or her CSRA claim, the district court applies to the CSRA claim the same standard of review that would be utilized by the Federal Circuit in reviewing the Board's disposition of that claim.

plaintiff was the victim of unlawful discrimination and pray for appropriate legal or equitable relief. Because all factual questions are decided de novo, the issues raised by the complaint itself would not require or warrant judicial consideration of the reasons why the MSPB had not sustained the plaintiff's claim.

In such a district court action, of course, the government could put other questions at issue. Here the government argues that, even if the district court has jurisdiction, the discrimination complaint should be dismissed for failure to exhaust administrative remedies. But the legal standard governing what steps, if any, a plaintiff must take to exhaust administrative remedies prior to filing a discrimination suit are established by the particular statute creating the claim at issue, not by the MSPB. The MSPB's practices and procedures regarding which appeals it will and will not decide on the merits are relevant to an exhaustion affirmative defense only if, and to the extent that, those practices and procedures are incorporated into the applicable statutory exhaustion requirement. The limited exhaustion requirements established by the ADEA, Title VII, and the mixed-case provisions of the CSRA are clearly distinct from the MSPB's own practices.

(2) The differences between the issue presented by a petition for review in the Federal Circuit and those raised by a district court affirmative defense of failure to exhaust are illustrated by the provisions of the ADEA. The exhaustion requirement applicable to

ADEA claims by federal employees is quite specific and limited.

> When an individual has not filed a complaint concerning age discrimination with the [EEOC], no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.

29 U.S.C. § 633a(d). Under section 633a(d) a plaintiff need only give the EEOC notice of intent to sue or "file[ ] a complaint." That requirement is satisfied upon the mere act of filing such a complaint; a claimant who has done so has satisfied the statutory exhaustion requirement, regardless of what subsequent developments may occur in the processing of that complaint. As the United States correctly explained in its brief in *Stevens v. Dep't of the Treasury*, 500 U.S. 1 (1991),

> [t]he provision granting the right to file civil actions under the ADEA ... is not conditioned on the complainant's having taken any particular steps toward seeking administrative relief.... The only statutory precondition for this action ... is unrelated to the processing of an agency complaint.... [C]onspicuously absent from the Act is a requirement that complainants ... [further] exhaust their administrative remedies if they choose to invoke them.

Brief for Respondents, *Stevens v. U.S. Dep't of the Treasury*, No. 89-1821, 1991 WL 11007947, at *24-*26.[60]

Prior to the CSRA an employee who filed a complaint alleging age discrimination could sue in district court. The CSRA imposed on mixed cases a short moratorium on post-complaint lawsuits, requiring that an employee wait at least 120 days after filing an administrative complaint before proceeding to court. See 5 U.S.C. § 7702(e).[61] Thus in the instant case, once Kloeckner in 2007 filed an appeal from the Final Agency Decision to the MSPB, the CSRA precluded her from filing suit until 120 days after initiating that appeal, or until after the final decision by the MSPB, whichever occurred first. But like the ADEA's exhaustion provision, the CSRA moratorium merely postpones the date on which an employee can file suit; it is "unrelated to the processing of [the] complaint."

In an action by a federal employee under the ADEA, the statutory exhaustion question is limited to whether the plaintiff has either filed a complaint or

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[60] In *Stevens*, the administrative complaint filed with the agency (but not, at least directly, with the EEOC), included a statement of "notice of intention to sue." 500 U.S. at 5. The complaint reached the EEOC only when the employee unsuccessfully appealed to the EEOC.

[61] Because under the CSRA an employee with a mixed case could seek relief from either the agency, the MSPB, the EEOC, or the Special Panel, the CSRA actually establish a series of such mandatory waiting periods. 5 U.S.C. § 7702(e).

given notice to sue, as required by the ADEA, and has waited until the end of any moratorium imposed by the CSRA. Disputes could arise as to whether one of these specific statutory exhaustion requirements had been met. In the instant case, for example, the government might contend that Kloeckner's action in taking her termination complaint to the EEOC did not constitute a "fil[ing]" under section 633a(d). But whatever dispute might arise, it would be governed by and limited to an application of the particular limited statutory exhaustion requirements in the ADEA and the CSRA. As in *Stevens*, so long as the applicable statutory exhaustion requirement was satisfied, Kloeckner's discrimination claim could not be dismissed. If, on the other hand, Kloeckner's claim had to be filed in the Federal Circuit, that court would not apply the ADEA or CSRA exhaustion standard; Kloeckner's claim could be rejected even though she had done all that the ADEA or CSRA required.

(3) Title VII also contains a specific exhaustion requirement for federal employees. In 1972, when Congress amended Title VII to cover federal employees, it included in section 717(c) a specific and limited exhaustion requirement. 42 U.S.C. § 2000e-16(c). The avowed purpose of the particularized terms of section 717(c) was both to make clear and specifically limit the steps that a federal employee would be required to take before filing suit, thus ending the litigation and uncertainty that had surrounded court-made exhaustion rules. The Senate Report explained this legislation was needed because "[i]n many cases, the

[federal] employee must overcome a U.S. Government defense of ... failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies."[62]

Section 717(c) provided that an employee could exhaust a claim by filing a timely complaint or appeal and then waiting until there has been a final agency decision, a final decision by the (then) Civil Service Commission, or the passage of 180 days after the filing of a complaint with the agency or the initiation of an appeal to the Civil Service Commission. As this Court has noted, the exhaustion provisions of section 717(c) were "precisely drawn" and "detailed," setting out a "careful and thorough remedial scheme" that was a specific and "careful blend of administrative and judicial enforcement powers." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833-34 (1976).[63] Congress intended to substitute the specific and limited exhaustion requirement in section 717(c) for the pre-1972 judicially fashioned exhaustion rules, which were tied to whatever administrative procedures and practices the various federal agencies might devise and under which courts made individualized determinations about whether a plaintiff should suffer

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[62] S. Rep. No. 95-415, at 16.

[63] Unlike other federal statutes, Title VII does not require that an employee, in addition to filing a timely complaint and waiting the specified period, must also "take all reasonable steps to secure" a decision. See 25 U.S.C. §§ 7428(b)(2), 7478(b)(2), 7479(b)(2).

dismissal because he or she had made some error in the course of the administrative process. Section 717 as a whole was intended to create for federal workers a specific exhaustion and remedial regime comparable to that provided by Title VII for private and state and local government employees, who exhaust their remedies under Title VII simply by filing a timely administrative charge with the EEOC (or a state or local agency) and waiting for a specified period of time. See *Chandler v. Roudebush*, 425 U.S. 840, 856-58 (1976).

In 1978, the CSRA abolished the Civil Service Commission and transferred its responsibility for hearing Title VII appeals to the EEOC (in non-mixed cases) and the MSPB (in mixed cases). Sections 7702 and 7703 carried forward the provision of the original section 717(c) permitting an employee to file suit after a decision by the agency or the resolution of an appeal, now to be heard by the MSPB. Section 7702(e)(1) carried forward the provision of section 717(c) permitting an employee to sue if the agency process or the appeal exceeded a specified period of time. In a Title VII mixed case filed in district court, if the government were to argue that a plaintiff had failed to exhaust administrative remedies, it is the specific, carefully drawn requirements of section 717(c), 7702 and 7703 which would govern the disposition of that defense.

Requiring mixed case plaintiffs to proceed in the Federal Circuit would largely circumvent these carefully crafted statutory exhaustion requirements. Rather than apply these specific statutory provisions

– which govern only access to district court, but not the MSPB's discretion in processing appeals – the Federal Circuit would ordinarily enforce whatever procedures the MSPB or a particular administrative judge might adopt, sort out complex disputes about procedure, jurisdiction and interrelated agency practices, and dismiss the claims of employees who failed to understand or predict the application of those complex standards. The near legendary complex, labyrinthine and still evolving mixed case administrative procedures would control, rather than the specific and limited statutory exhaustion requirements established by Congress.

(4) Both the ADEA and Title VII permit complaining parties to file suit without ever appealing to the MSPB. Complainants would have a considerable incentive to avoid such appeals if by seeking redress from the MSPB they will run not only the risk of losing their right to proceed in district court, but also the risk that their claims will be forfeited because of some misstep in the MSPB proceedings that in the Federal Circuit (but not in district court) would bar those claims. An employee could avoid those dangers only by forsaking an appeal to the MSPB, and instead proceeding directly to district court after a Final Agency Decision, but by doing so the employee would forfeit his or her CSRA claim. "The Civil Service Reform Act was not intended to present a claimant with a Hobson's litigation choice." *Sloan v. West*, 140 F.3d 1255, 1262 (9th Cir. 1998). That dilemma is avoided by construing section 7703(b)(2) to provide

that all mixed case discrimination claims are to be brought in district court.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed, and the case remanded for further consideration consistent with the opinion of the Court.

Respectfully submitted,

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APPENDIX A – 5 U.S.C. § 7702

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by –

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves –

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of –

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not

to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either –

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law –

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and –

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole –

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including –

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral

arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of –

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after –

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

APPENDIX B – 5 U.S.C. § 7703

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable.

Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a

substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

APPENDIX C – 29 U.S.C. § 633a

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall –

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified

of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants

in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections 626(d)(3) and 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission

under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

APPENDIX D – 42 U.S.C. § 2000e-16

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and

regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall –

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to –

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[1]

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[1] So in original.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination

Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

RESPONDENT'S BRIEF

No. 11-184

In the Supreme Court of the United States

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Under the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, when a federal employee bases a complaint on an adverse personnel action that is appealable to the Merit Systems Protection Board (MSPB) and alleges that unlawful discrimination was a basis for the action, she has filed what is known as a "mixed case." The question presented is:

Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over review of an MSPB decision dismissing a mixed case on threshold procedural grounds without reaching the merits of the employee's civil service or discrimination claims.

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In the Supreme Court of the United States

No. 11-184

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 639 F.3d 834. The opinion of the district court (Pet. App. 11a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2011. The petition for a writ of certiorari was filed on August 11, 2011, and was granted on January 13, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)) (brackets omitted). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* Congress chose the particular protections and remedies in the CSRA in order to strike a "balance" between "the legitimate interests of the various categories of federal employees" and "the needs of sound and efficient administration." *Id.* at 445. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985); see *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

The CSRA essentially creates a tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. See generally *Fausto*, 484 U.S. at 445-447; *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983). For some of the most serious types of actions—termed "adverse actions" under the statute and including actions such as termination, demotion, and suspension for more than 14 days—an employee has a right to appeal the employing agency's decision to the Merit Systems Protection Board (MSPB or Board). See, *e.g.*, 5 U.S.C. 4303(e); 5 U.S.C.

7513(d); 5 U.S.C. 7512 (enumerating appealable actions); see also 5 U.S.C. 7701(a). As particularly relevant here, certain types of employees may appeal to the MSPB actions removing them from employment "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see 5 U.S.C. 7513(d). For other less serious types of actions—termed "prohibited personnel practices" under the statute and including actions such as appointments, promotions, and reassignments—an employee is not entitled to appeal to the MSPB, see 5 U.S.C. 2302, but is entitled to review by the Office of Special Counsel (OSC), with judicial scrutiny "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry," *Carducci*, 714 F.2d at 175 (quoting *Cutts* v. *Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982)).

The MSPB is an independent government agency with an adjudicative role. See 5 U.S.C. 1204(a) (specifying that the MSPB shall "hear [and] adjudicate * * * all matters within the jurisdiction of the Board"). It can supervise discovery, hold hearings, and take evidence (including witness testimony). See 5 U.S.C. 1201, 1204, 7701; 5 C.F.R. 1201.11-1201.113. And it can order appropriate relief if it determines that the employing agency acted improperly. 5 U.S.C. 1204(a). When an employee challenges his removal for "the efficiency of the service," the MSPB may uphold the removal only if the employing agency can prove by a preponderance of the evidence that its action was justified. 5 U.S.C. 7701(c)(1).

b. The CSRA provides special procedures for handling what are known as "mixed cases"—*i.e.*, cases in which an employee has been affected by an adverse action that is appealable to the MSPB *and* "alleges that a

basis for the action was discrimination prohibited by" Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, or certain other federal antidiscrimination laws. 5 U.S.C. 7702(a)(1)(A)-(B); see, *e.g.*, *Batientine* v. *MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984); 29 C.F.R. 1614.302. The CSRA procedures for mixed cases, which are primarily set forth in 5 U.S.C. 7702, allow the employee to elect among various administrative-review options that can lead to a final "judicially reviewable action." Both the Equal Employment Opportunity Commission (EEOC) and the MSPB have promulgated regulations that apply to mixed cases. See 29 C.F.R. 1614.302 (EEOC regulations); 5 C.F.R. 1201.151 (MSPB regulations).

Under the CSRA, an employee may initiate a mixed case in one of two ways. 5 U.S.C. 7702(a)(1)-(2); see also 29 C.F.R. 1614.302(b); 5 C.F.R. 1201.154(a). First, he can proceed (at least initially) along essentially the same path that the antidiscrimination laws and their implementing regulations provide for any discrimination claim (including those challenging prohibited personnel practices that are not appealable to the MSPB) by filing a formal equal employment opportunity (EEO) complaint with the employing agency. See 29 C.F.R. 1614.302(b); see also 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.154(a). That is called a "mixed case complaint." 29 C.F.R. 1614.302(a)(1). Second, he can forgo the EEO complaint process and simply appeal the employing agency's action directly to the MSPB, alleging that the adverse employment action was motivated by discrimination. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b). That is called a "mixed case ap-

peal." 29 C.F.R. 1614.302(a)(2). The employee must initially elect to pursue one, but not both, of those two remedies. The regulations provide that a mixed-case complainant "may not initially file both a mixed case complaint and an appeal on the same matter," and specify that "whichever is filed first" (*i.e.*, either an EEO complaint with the agency or an appeal with the MSPB) "shall be considered an election to proceed in that forum." 29 C.F.R. 1614.302(b).

If the employee files a mixed-case complaint, the agency "shall resolve [the] matter within 120 days." 5 U.S.C. 7702(a)(2)(A)-(B); see 29 C.F.R. 1614.302(d)(1)(i). "The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2); see 29 C.F.R. 1614.302(d)(1)(ii). An employee at that point has two options for seeking review of an agency's final decision on a mixed-case complaint: he can either file suit in district court or appeal to the MSPB. If the employee appeals the matter to the MSPB, the appeal follows the same procedural path (described in the following paragraph) as would an initial mixed-case appeal. 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.151, 1201.153-1201.154.

If the employee files a mixed-case appeal (either instead of filing a mixed-case complaint or from a final agency decision on a mixed-case complaint), the MSPB "shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with [its] appellate procedures under [5 U.S.C. 7701 and 7702]." 5 U.S.C. 7702(a)(1); see 5 C.F.R. 1201.156(a). The cross-referenced "appellate procedures" include the "regulations prescribed by the Board" for handling employee appeals, 5 U.S.C. 7701(a), which allow the MSPB, among other things, to "dis-

miss[]" an untimely appeal without deciding any substantive issues at all, 5 C.F.R. 1201.22(c); see 5 C.F.R. 1201.152 (incorporating 5 C.F.R. 1201.22(c) in mixed cases).

c. The CSRA provides for judicial review of the MSPB's decisions. 5 U.S.C. 7703. One of the "structural elements" that is "clear in the framework of the CSRA" is "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review" "of disputes over adverse personnel action." *Fausto*, 484 U.S. at 449. As a general matter, the Federal Circuit has "exclusive jurisdiction" over appeals from "final order[s] or final decision[s] of the [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9). Section 7703(b)(1) of Title 5 states that, "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." Thus, if an employee prevails in the MSPB, any petition for review by the government must be filed in the Federal Circuit. 5 U.S.C. 7703(d). That review is limited, however, to cases in which the Director of the Office of Personnel Management (OPM) determines "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive," *ibid.*, and thus does not provide for review of determinations against the agency on the merits of discrimination claims. If the employee does not obtain the relief he seeks from the MSPB, Section 7703(b)(1) requires that his petition for judicial review of the MSPB's final order or final decision likewise "shall be filed in the United States Court of Appeals for the Fed-

eral Circuit," "[e]xcept as provided in" Section 7703(b)(2).

The sole exception to the Federal Circuit's exclusive jurisdiction to review MSPB decisions, set forth in Section 7703(b)(2), provides for a different form of judicial review of final MSPB decisions in mixed cases—*i.e.*, "[c]ases of discrimination subject to the provisions of [5 U.S.C.] 7702." In such cases, "[n]otwithstanding any other provision of law," an employee may file suit in district court under certain enumerated antidiscrimination laws, including Title VII and the ADEA, "within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702." 5 U.S.C. 7703(b)(3). Section 7702(a)(1) in turn requires that, in mixed cases (both mixed-case appeals and appeals of agency action on mixed-case complaints), the MSPB must, within 120 days, decide "both the issue of discrimination and the appealable action." When the Board issues a decision under Section 7702(a)(1), that decision becomes "a judicially reviewable action as of" the date the decision is issued if the employee does not petition the EEOC for review. 5 U.S.C. 7702(a)(3)(A). MSPB decisions that are not "judicially reviewable action[s] under * * * section 7702" do not fall within Section 7703(b)(2)'s exception to the Federal Circuit's exclusive jurisdiction to review final MSPB decisions. 5 U.S.C. 7703(b)(1)-(2).

d. When the Federal Circuit reviews an MSPB decision, it may correct any errors of procedural or substantive law; vacate any action that is "arbitrary, capricious, [or] an abuse of discretion"; and set aside any findings "unsupported by substantial evidence." 5 U.S.C. 7703(c). The courts of appeals have interpreted Section 7703(c) as requiring a district court, in a proceeding un-

der the Section 7703(b)(2) exception for mixed cases, to apply those same administrative-law standards in reviewing CSRA-related issues (*e.g.*, whether the challenged employment action was undertaken for "the efficiency of the service" or whether the discipline was too harsh under the circumstances). See, *e.g.*, *Williams* v. *Wynne*, 533 F.3d 360, 373 (5th Cir. 2008); *Lawrence* v. *Department of Interior*, 525 F.3d 916, 920 (9th Cir.), cert. denied, 555 U.S. 888 (2008); *Sher* v. *United States Dep't of Veterans Affairs*, 488 F.3d 489, 499 (1st Cir. 2007) (citing Federal and D.C. Circuit decisions), cert. denied, 552 U.S. 1309 (2008). District courts review an employee's discrimination claims under a de novo standard. 5 U.S.C. 7703(c).

2. a. Petitioner is a former federal employee who worked as a Senior Investigator for the Employee Benefits Security Administration of the Department of Labor (DOL) in St. Louis, Missouri. Pet. App. 1a. In May 2005, petitioner began an extended period of leave from her job. J.A. 15. On June 13, 2005, petitioner filed an EEO complaint with DOL's Civil Rights Center (the agency) alleging that DOL had discriminated against her on the basis of age and sex by subjecting her to a hostile work environment during her time in the St. Louis office. Pet. App. 13a; J.A. 10-11. Because that complaint did not concern an employment action appealable to the MSPB, it was not a mixed-case complaint. See 29 C.F.R. 1614.302(a)(1).

After petitioner had used all of her accumulated leave, as well as advanced leave granted to her by DOL, petitioner was permitted to assume leave-without-pay status. J.A. 33. When petitioner did not respond to DOL's requests for documentation to support her absence, DOL placed her on absent-without-leave status.

J.A. 19-20, 31-34. In August 2005, petitioner responded by adding a retaliation claim to her EEO complaint. Pet. App. 2a-3a. In June 2006, the agency completed its investigation of petitioner's complaint and provided her with its report of investigation. J.A. 13. Pursuant to the procedures applicable to non-mixed EEO complaints, petitioner then requested a hearing with an EEOC administrative judge. *Ibid.*; see 29 C.F.R. 1614.108(f).

b. Petitioner never returned to work, and, in July 2006, DOL terminated her employment. Pet. App. 3a. In August 2006, while her EEO hostile work environment and retaliation complaint was still pending before the EEOC administrative judge, petitioner filed a mixed-case appeal of her removal with the MSPB. *Ibid.* One month later, petitioner filed a motion to dismiss her mixed-case appeal without prejudice because she desired instead to add her claim of discriminatory removal to her already-pending EEO complaint. *Ibid.*; J.A. 4. Petitioner stated that she wished to avoid the expense of conducting discovery before both the EEOC and the MSPB. Pet. App. 3a; see J.A. 4. In her motion, petitioner, who was represented by counsel, requested that the "MSPB appeal be dismissed, without prejudice, for a period of four months, to allow the discovery phase of her EEOC appeal to proceed." Pet. App. 14a. DOL objected to the extent that petitioner sought a temporary dismissal only until the completion of discovery before the EEOC, arguing that petitioner should be required at that point to elect the forum in which to litigate her removal. J.A. 4.

On September 18, 2006, an MSPB administrative judge granted petitioner's motion. J.A. 3-5. At the request of petitioner, the dismissal order provided that petitioner's appeal was dismissed "without prejudice" to

her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—*whichever occurs first*." J.A. 5. The order further provided that "[t]his case will not be accepted for refiling after January 18, 2007." *Ibid.*

c. Shortly thereafter, the EEOC administrative judge permitted petitioner to amend her EEO complaint to include the discrimination challenge to her removal. J.A. 13. The EEOC also scheduled a hearing on petitioner's complaint. Pet. App. 4a. Petitioner later sought to amend her EEO complaint again, this time to add allegations of discrimination based on disability (work-related depression, stress, and anxiety). J.A. 14. The EEOC denied that motion as untimely and insufficiently related to the already-pending claims. *Ibid.*

The EEOC administrative judge subsequently canceled the hearing and returned the complaint to the Department of Labor for a final decision because petitioner had abused the discovery process. Pet. App. 4a; J.A. 15 (hearing canceled due to petitioner's "bad-faith pre-hearing conduct"). DOL's Civil Rights Center later noted that returning the complaint to the agency was warranted for the additional reason that, in light of the newly added challenge to petitioner's removal, it was now a mixed-case complaint, which an agency, rather than the EEOC, must resolve in the first instance. J.A. 15 n.2; see 5 U.S.C. 7702(a)(2); see also 29 C.F.R. 1614.302(b) and (d)(2).

In October 2007, the agency issued a final decision rejecting petitioner's claims of discrimination and retaliation, and upholding her removal. J.A. 10-49. The agency concluded that "a review of the evidence does not support [petitioner's] contention that her age and sex were factors in management's treatment of her" and

that "[t]he record is replete with management's legitimate, non-discriminatory justifications for its treatment of [her]." J.A. 42, 46. Petitioner's supervisors, the agency explained, "had reasons to believe that [she] engaged in her personal business and educational pursuits during work time, and [had] received telephone calls and faxes [at the office] regarding these matters"; "were legitimately concerned about her leave use, her extended and unexplained absences from the office, and her relatively low case productivity"; and had received neither responses to their letters "regarding [petitioner's] intentions to return to work" nor "medical documentation to support her extended absence." *Ibid.* In accordance with the default procedures for mixed-case complaints, see 29 C.F.R. 1614.302(d)(3), the agency's decision stated that petitioner could either appeal her mixed case to the MSPB or file a civil action in federal district court within 30 days, but not both. J.A. 48-49.

d. Petitioner filed an appeal with the MSPB on November 28, 2007—within 30 days of the agency's final decision, but more than ten months after the deadline of January 18, 2007, previously imposed by the MSPB at petitioner's request. Pet. App. 4a. Petitioner argued that her appeal should be permitted because it was a different appeal from the one the Board had previously dismissed. J.A. 53. On February 27, 2008, an MSPB administrative judge rejected petitioner's argument and dismissed the appeal as untimely. J.A. 50-60. The administrative judge reasoned that the "adverse action from which [petitioner] is appealing remains the same, i.e., [DOL's] decision to remove her from employment." J.A. 54-57. The normal 30-day window for appealing from an agency's resolution of an EEO complaint did not apply here, the administrative judge explained, "because

[petitioner's] first MSPB appeal was dismissed—and the re-filing deadline was established—before the removal action was merged into [petitioner's] EEO complaint." J.A. 54. And the "initial decision dismissing [petitioner's] first MSPB appeal set a clear deadline for re-filing the appeal—within 30 days after the EEO decision or by January 18, 2007, *whichever occurs first*." J.A. 55; see also *ibid.* ("[T]he initial decision stated that the appeal 'will not be accepted for re-filing after January 18, 2007.'").

The administrative judge also declined to excuse the untimely filing. J.A. 55-57. The administrative judge explained that the MSPB "will not waive its timeliness requirements when an appellant consciously elects another forum in which to challenge an adverse action." J.A. 54. Here, "[i]n the face of clear notice of the re-filing deadline, as well as the consequences for failing to meet that deadline, [petitioner], with assistance of counsel, decided to pursue her EEO complaint." J.A. 55. The administrative judge emphasized that petitioner "did not have the discretion to determine on her own the best use of agency and [MSPB] resources" and that if she "believed it was inconvenient to pursue her MSPB appeal before the agency issued the final decision on her EEO complaint, she could have asked the [MSPB] for an extension of time in which to re-file" or re-filed and sought another non-prejudicial dismissal. J.A. 56.

The administrative judge's dismissal order became the final decision of the MSPB when petitioner did not seek further administrative review. Pet. App. 4a; see 5 C.F.R. 1201.113-1201.114. The dismissal order specified that, within 30 days of the order's becoming final, petitioner could file a petition for review in the Federal Cir-

cuit if she were "dissatisfied" with the MSPB's resolution of her case. J.A. 59.

3. Rather than seeking review in the Federal Circuit, petitioner filed a complaint in district court, requesting relief under Title VII and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* (which covers disability discrimination).[1] J.A. 61-70. Petitioner stated that her complaint was "a timely appeal from the Final Agency Decision" and that it was "filed within 30 days of the date of the final decision of the MSPB on [petitioner's] appeal of the Final Agency Decision." J.A. 62, 64.

The district court dismissed the case for lack of jurisdiction. Pet. App. 11a-22a. As an initial matter, the district court determined that petitioner's complaint was "properly characterized as an appeal from the [latest] MSPB decision," rather than from the agency's final decision on her EEO complaint. *Id.* at 21a-22a. The court explained that, once the agency decided the EEO complaint, petitioner "was permitted either to file an appeal with the MSPB or in federal district court, but not both." *Id.* at 20a-21a. By choosing to appeal to the MSPB, the district court explained, petitioner "foreclosed her ability to appeal the [final agency decision] directly to" the district court. *Id.* at 21a.

The court concluded that the Federal Circuit had exclusive jurisdiction over petitioner's appeal of the MSPB's decision. Pet. App. 19a-20a. The district court explained that, "to qualify as a case of discrimination appealable to a federal district court, the MSPB must have resolved the merits of the discrimination claim." *Id.* at 19a. Here, however, the MSPB had not resolved the

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[1] Although petitioner's complaint also asserts that DOL discriminated against her on the basis of age, it does not mention the ADEA. See J.A. 61-70.

merits of petitioner's discrimination claims, but instead had dismissed her appeal as untimely, "and appeal of such a threshold issue is properly filed with the Federal Circuit." *Id.* at 22a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The court agreed with the longstanding view of the Federal Circuit and a majority of other circuits that, "until the *merits* of a 'mixed' discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed" only to the Federal Circuit. *Id.* at 6a (quoting *Ballentine*, 738 F.2d at 1247). The court relied on the Federal Circuit's reasoning that, as a matter of statutory construction, the "judicially reviewable action by the MSPB which makes an appeal a 'case of discrimination' under § 7703(b)(2) that can be filed in district court is that the MSPB has decided both the issue of discrimination and the appealable action." *Ibid.* (quoting *Ballentine*, 738 F.2d at 1246). And it emphasized that the Federal Circuit's "functional approach" rests on a "logic[al] infer[ence] that Congress intended to require the de novo district court review that federal anti-discrimination statutes provide when the MSPB has ruled on the merits of discrimination issues in a 'mixed case,' but intended that the Federal Circuit provide uniform review of MSPB rulings on procedural, non-merits issues." *Id.* at 9a.

SUMMARY OF ARGUMENT

I. A. As this Court has previously held, one of the primary structural elements of the CSRA is the primacy of the Federal Circuit as the forum for judicial review. That structure implements Congress's intent that case law governing the MSPB develop in a uniform way.

Congress permitted only a narrow exception to the exclusivity of the Federal Circuit's judicial review of MSPB decisions, granting district courts jurisdiction to review final MSPB decisions only in mixed cases and only when such decisions are "judicially reviewable action[s]." 5 U.S.C. 7703(b)(2). In order for a case to be a mixed case—a "[c]ase[] of discrimination subject to the provisions of section 7702"—the complaining employee must have been affected by an action appealable to the MSPB and allege that a basis for the action was discrimination prohibited by enumerated laws such as Title VII. In order for a final Board decision to be a "judicially reviewable action under [5 U.S.C.] 7702," as required for the exception to the Federal Circuit's exclusive jurisdiction to apply, the decision must reach the merits of the employee's discrimination claim.

When the MSPB disposes of a case on procedural or jurisdictional grounds without reaching the discrimination claim (as it did in petitioner's case), the Board does not issue a "judicially reviewable action" under Section 7702, and the Board's final action disposing of the case must be reviewed in the Federal Circuit. That scheme of judicial review is reflected throughout the provisions of Sections 7702 and 7703. For example, Section 7702(b) permits an employee to seek review by the EEOC of a Board decision, but only to the extent such decision reached the employee's discrimination claim. If a Board decision does not reach any discrimination issue, the employee may not seek review either in district court or by the EEOC; the only type of review available for such decisions is in the Federal Circuit.

The sole exception to the requirement that a final MSPB decision reach the issue of discrimination in order to be eligible for de novo review in district court is

the escape hatch provided in Section 7702(e)(1)(B), which protects employees from being held in limbo by Board inaction. That provision states that, when the Board fails to issue a judicially reviewable action within 120 days of the filing of the appeal, the employee may file suit in district court. That provision is an exception to the requirement that the Board issue a final decision before an employee may seek judicial review, *not* to the requirement that any final decision reach the discrimination issue before an employee may file suit in district court. When, as here, the Board issues a final decision that does not reach the discrimination issue, Section 7702(e)(1)(B) does not apply.

B. Limiting the availability of de novo district court review of MSPB decisions to cases in which the Board issues a final decision on the discrimination issue best promotes congressional intent. First, it preserves as much as possible Congress's objective to provide exclusive Federal Circuit review of MSPB procedural and jurisdictional questions. That exclusivity is sacrificed only to the extent necessary to achieve Congress's other important objective, *i.e.*, ensuring that discrimination claims are heard de novo in district court. When an MSPB decision does not reach any discrimination issue, there is no reason to permit a district court to review it.

Petitioner suggests that the complexity of the CSRA's administrative review scheme works to deprive employees of their right to bring discrimination claims in district court. That is not so. Employees such as petitioner have multiple opportunities throughout the administrative process to file suit in district court. Indeed, petitioner does not dispute that she could have filed such a suit following the agency's decision on her EEO complaint. Under petitioner's view of Section 7703(b)(2),

there would be no consequence for an employee who fails, after receiving a final agency decision, to either file a timely suit in district court or file a timely MSPB appeal because she could file an untimely appeal with the MSPB and then seek district court review of the MSPB's decision dismissing her appeal as untimely.

The fact that the CSRA gives employees multiple review options is a benefit to employees, not a trap. If petitioner had timely filed her MSPB appeal, she would have had essentially a free chance to obtain relief—because if she had prevailed before the Board on her discrimination claim, the agency could not have sought judicial review of that determination, and if she had not prevailed, she would have been entitled to seek de novo review in the district court. The CSRA and its implementing regulations also provide various safeguards to protect employees who timely file complaints or appeals, but file them in the wrong place. Because petitioner did not timely file her appeal (by failing to comply with a deadline imposed at her own request and with the advice of counsel), she is not entitled to those safeguards. But employees who pursue their claims in a timely fashion will not accidentally forfeit their right to de novo district court review.

II. Petitioner newly contends that, in fact, she does not wish to seek review of the MSPB's decision at all, but only wishes to pursue her discrimination claims directly under Title VII or the ADEA. That new contention is belied by the manner in which she has litigated her case thus far. And, in any case, it is clear from the briefs filed at the petition-for-certiorari stage that the question before the Court is whether, *under the CSRA*, petitioner may seek review in the district court of the MSPB's dismissal of her appeal on procedural grounds.

The question whether the district court would have jurisdiction over petitioner's discrimination claims directly under Title VII or the ADEA (and if so whether such claims were timely filed) is not before the Court. We note, however, that the antidiscrimination statutes on which petitioner relies do not give district courts jurisdiction to review MSPB decisions. Only the CSRA does that, and only in the specified circumstances.

Here, petitioner chose to appeal the agency's final decision to the MSPB rather than seek review in the district court. She cannot now recharacterize her complaint as seeking review of the agency's decision. By the terms of the CSRA, that decision ceased being a "judicially reviewable action" when petitioner filed her MSPB appeal. Once she elected to proceed before the MSPB, she was required to exhaust those remedies. If petitioner felt that the MSPB erroneously dismissed her appeal as untimely, she was entitled to seek review of that decision in the Federal Circuit. If the Federal Circuit had agreed with her, it would have remanded her case to the MSPB for a determination on the merits of her discrimination claim—a determination that would then qualify as a "judicially reviewable action" subject to de novo district court review.

ARGUMENT

The MSPB has nationwide jurisdiction over administrative appeals in mixed cases. The procedural rules governing such appeals do not vary with the particular judicial district in which the employee, or the employing agency, is located. And Congress did not invite geographic variance in the interpretation of those rules by allowing for judicial review of threshold procedural MSPB decisions across the various district courts.

Nothing in the CSRA mandates such an impractical system, and petitioner offers no reason why Congress could have desired it. To the contrary, Congress wished to provide uniform review of MSPB decisions in the Federal Circuit, except insofar as necessary to enable de novo district court review of statutory discrimination claims in mixed cases. The latter concern is entirely absent where, as here, the MSPB does not even reach the discrimination issue.

Petitioner now attempts to suggest that the district court could adjudicate her case without regard to anything the MSPB did. That suggestion is misplaced. Petitioner had the option of proceeding immediately to district court after the agency denied her EEO complaint, but she elected instead to pursue an administrative appeal by submitting her case to the jurisdiction of the MSPB. If she believed that the MSPB erred in dismissing her case on threshold procedural grounds, she could have sought review of that dismissal in the Federal Circuit. She may not now, however, proceed as though the MSPB's decision never happened.

I. THE FEDERAL CIRCUIT HAS EXCLUSIVE JURISDICTION TO REVIEW MSPB DECISIONS IN MIXED CASES THAT DO NOT REACH THE ISSUE OF DISCRIMINATION

Congress created the Federal Circuit in order "to provide 'a prompt, definitive answer to legal questions' " in "ceratin areas of the law" that have a "'special need for nationwide uniformity.'" *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981)). Because Congress viewed MSPB decisions as one such area of the law in need of uniformity, Congress provided for centralized judicial review of those decisions. See Federal Courts

Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 37-38; *id.* § 144, 96 Stat. 45; 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). This Court recently reaffirmed that, notwithstanding the existence of other general grants of subject matter jurisdiction to federal district courts, the CSRA vests exclusive judicial review of MSPB decisions in the Federal Circuit. *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2132-2141 (2012). The only exception to the Federal Circuit's otherwise exclusive review of MSPB decisions is provided in 5 U.S.C. 7703(b)(2). 132 S. Ct. at 2134. That provision allows an employee who has filed a mixed-case appeal (including an appeal of a mixed-case complaint) with the Board to file suit in district court under the applicable antidiscrimination statute when the MSPB issues a final decision that is a "judicially reviewable action" under 5 U.S.C. 7702. When, as here, the MSPB dismisses an employee's mixed-case appeal on threshold procedural grounds, that decision is not a "judicially reviewable action" under Section 7702 and thus does not entitle an employee to file suit in district court pursuant to the exception in Section 7703(b)(2).

A. The Text Of Sections 7702 And 7703 Dictate That An MSPB Dismissal For Untimeliness Is Not A "Judicially Reviewable Action" In District Court

1. Section 7703 of the CSRA provides that, "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the [MSPB] shall be filed in the United States Court of Appeals for the Federal Circuit." 5 U.S.C. 7703(b)(1); see 28 U.S.C. 1295(a)(9) (Federal Circuit has "exclusive jurisdiction" over MSPB final decisions pursuant to 5 U.S.C. 7703(b)(1)). The referenced exception to the

Federal Circuit's exclusive jurisdiction over final MSPB decisions applies in "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). In those cases, the CSRA permits an employee to seek review of the MSPB's decision by filing suit in district court within 30 days after the employee receives "notice of the judicially reviewable action under such section 7702." *Ibid.* Whether a final decision of the MSPB gives rise to an employee's right to file suit in district court must therefore be determined with reference to (1) whether the case qualifies as a "[c]ase[] of discrimination subject to the provisions of section 7702" and (2) whether the Board's final decision is a "judicially reviewable action under * * * section 7702." 5 U.S.C. 7703(b)(2). That inquiry therefore requires an examination of Section 7702 itself.

A case qualifies as a "[c]ase[] of discrimination subject to the provisions of section 7702" when an employee has both "been affected by an action which [she] may appeal" to the MSPB *and* "alleges that a basis for the action was discrimination" prohibited under a federal antidiscrimination statute such as Title VII. 5 U.S.C. 7702(a)(1)(A)-(B). Section 7702(a)(3) defines for the most part which MSPB decisions qualify as "judicially reviewable action[s]," providing that "[a]ny decision of the Board *under paragraph (1)* of this subsection shall be a judicially reviewable action as of" the date of the decision (unless the employee seeks review of the decision by the EEOC). 5 U.S.C. 7702(a)(3) (emphasis added). Paragraph (1), in turn, requires that "the [MSPB] shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701." 5 U.S.C. 7702(a)(1). The

"*decision* of the Board" under Section 7702(a)(1) that constitutes a "judicially reviewable action" therefore is one that "*decide[s]* both the issue of discrimination and the appealable action." 5 U.S.C. 7702(a)(1). In short, a "judicially reviewable action" in a "[c]ase[] of discrimination" under Section 7702—*i.e.*, the type of MSPB decision to which the exception in Section 7703(b)(2) applies—is a Board decision in a mixed case on "both the issue of discrimination and the appealable action."

The Board's decision here is not a judicially reviewable action under Section 7702 because the MSPB did not reach the merits of either petitioner's discrimination claim or her appealable action. Instead, the MSPB dismissed petitioner's appeal as untimely. That decision was a final decision pursuant to the Board's appellate procedures under Section 7701, which authorize the Board to promulgate regulations governing appeals before it. See 5 U.S.C. 7701(k). Because it was a *non*-merits decision, however, it was not a decision "under paragraph (1) of this subsection," *i.e.*, Section 7702(a)(1). It is not, therefore, a "judicially reviewable action under" Section 7702 and does not fall within Section 7703(b)(2)'s exception to the Federal Circuit's exclusive jurisdiction over review of final MSPB decisions. Review thus must lie in the Federal Circuit.

The MSPB's regulations—promulgated pursuant to the specific statutory grant of authority to do so in 5 U.S.C. 7701(k)—reinforce that a final MSPB decision in a mixed case is subject to review in district court only if it decided the issue of discrimination. In the provision governing judicial review of mixed-case decisions, the regulations acknowledge that employees generally have the right to seek judicial review in district court of final decisions "under 5 U.S.C. 7702." 5 C.F.R. 1201.157. The

same provision states, however, that an appeal of the Board's decision may be filed in the Federal Circuit instead "[i]f an appellant elects to waive the discrimination issue." *Ibid.* Although that provision does not speak directly to the question presented here, it is consistent with the idea that the Federal Circuit should have exclusive jurisdiction to review final MSPB decisions unless those decisions reach the merits of a discrimination claim.[2]

2. Other provisions in Sections 7702 and 7703 further support the conclusion that a judicially reviewable action under Section 7702 must be a final decision under Section 7702(a)(1), which in turn must be a merits decision on both the issue of discrimination and the appealable action.

First, Section 7702(a)(3) provides that a final Board decision "under" Section 7702(a)(1) becomes a "judicially reviewable action" upon issuance of the decision only if the employee opts not to petition the EEOC to review the decision pursuant to Section 7702(b)(1). See 5 U.S.C. 7702(b)(1) ("An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision."). Section 7702(b) makes clear, in turn, that the EEOC's review of such a decision is limited to determining whether (1) "the decision of the Board constitutes an incorrect interpretation of any provision of" the federal antidiscrimination law at issue, or (2) "the decision involving such [antidiscrim-

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[2] The interim, proposed, and initial rules promulgated by the MSPB after passage of the CSRA (and relied on by petitioner, see Br. 50-52) are not to the contrary. By their terms, those regulations generally govern Board decisions under Section 7702—which, as explained, are decisions on the merits of the discrimination claim.

ination] provision is not supported by the evidence in the record as a whole." See 5 U.S.C. 7702(b)(3)(B)(i)-(ii). Because the EEOC's review of a Board decision "under" Section 7702(a)(1) is thereby limited to substantive questions regarding the issue of discrimination, such a decision must be a decision on "both the issue of discrimination and the appealable action," as specified in Section 7702(a)(1). Petitioner's suggestion (Br. 45) to the contrary is thus incorrect. Where, as here, the Board does not reach the merits of the discrimination claim, the Board's decision is not a decision "under subsection (a)(1)" subject to review by either a district court or the EEOC rather than the Federal Circuit.

Second, 5 U.S.C. 7703(a) differentiates between final MSPB decisions that address the merits of the challenged personnel action and those that do not. Section 7703(a)(1) provides generally that any employee "adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." Section 7703(a)(2) specifies that the MSPB, rather than the employing agency, "shall be named respondent in any proceeding brought pursuant to" Section 7703(a)—"*unless* the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action * * * , in which case the agency responsible for taking the personnel action shall be the respondent." 5 U.S.C. 7703(a)(2) (emphasis added). Here, there is no MSPB "order or decision on the merits on the underlying personnel action." Any action seeking judicial review of the Board's decision must therefore name the MSPB, rather than the Department of Labor or its Secretary, as the responding party. That alignment of parties emphasizes that the only judicial review available for a Board deci-

sion that disposes of a mixed case on threshold procedural or jurisdictional grounds is review of the MSPB's actions in disposing of the case. See S. Rep. No. 413, 100th Cong., 2d Sess. 36 (1988) (explaining that this provision, which was amended in 1989, requires that, "[i]n appeals involving procedural or jurisdictional matters, the Board would be the respondent"); *id.* at 22. Where, as here, the Board does not reach the merits of the employee's discrimination claim, review of the Board's order cannot include review of the discrimination claim—and therefore does not fall within the exception specified in Section 7703(b)(2). Review of such an order must be in the Federal Circuit.[3]

3. Petitioner's contrary reading of the language of Sections 7702 and 7703 is misguided. Petitioner argues (see, *e.g.*, Br. 30-33) that, by using the phrase "[c]ases of discrimination subject to the provisions of section 7702," Section 7703(b)(2) grants district courts jurisdiction over all mixed cases filed before the Board as soon as they are filed. That construction reads critical language out of Section 7703. It also defies common sense.

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[3] As noted in the government's brief in opposition to the petition for a writ of certiorari (at 13-16), the Second and Tenth Circuits have held that, although MSPB dismissals of mixed cases on jurisdictional grounds are not subject to district court review under Section 7703(b)(2), dismissals of such cases on procedural grounds are. See *Downey* v. *Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Harms* v. *IRS*, 321 F.3d 1001, 1008 (10th Cir.), cert. denied, 540 U.S. 858 (2003). Such a distinction has no basis and petitioner does not ask this Court to adopt it. The reason for creating an exception to the Federal Circuit's exclusive jurisdiction over final MSPB decisions is to allow discrimination claims to be heard in district courts. When the Board disposes of an appeal on grounds that do not touch on discrimination, that exception does not apply, regardless of whether the decision rests on jurisdictional or procedural grounds.

a. The text of Section 7703(b) makes clear both that Section 7703(b) as a whole addresses a court's jurisdiction to review "a final order or final decision of the Board," 5 U.S.C. 7703(b)(1), and that Section 7703(b)(2) in particular grants district courts jurisdiction to review only "judicially reviewable action[s] under such section 7702." Thus, although it is true that all mixed cases appealed to the MSPB are subject to the requirements of Section 7702, no court has jurisdiction to review such a case until there is a judicially reviewable action under Section 7702. It is therefore true but irrelevant that, as petitioner puts it (Br. 32), "several provisions of section 7702 clearly apply to claims *before* the MSPB has acted at all." The fact that Section 7702 governs an agency's handling of mixed-case complaints as well as the MSPB's initial handling of appeals does not mean that Section 7703(b)(2) grants district courts jurisdiction over such cases at any point in the administrative process an employee may opt to seek review. Employees may not, for example, seek de novo district court review of non-final Board orders governing discovery requests and briefing schedules. And there must be a "judicially reviewable action"—a final decision on the merits of the discrimination claim—before a district court can have jurisdiction to review the case.

To put it another way, petitioner would draw the distinction between cases governed by Section 7703(b)(1) and cases governed by Section 7703(b)(2) on the basis of the underlying factual allegations. If a case alleges discrimination in an action appealable to the Board, petitioner argues, a district court has jurisdiction to review it at any point pursuant to Section 7703(b)(2). That is incorrect. Section 7703 distinguishes between different types of final Board decisions, not different types of un-

derlying allegations, assigning review of all such decisions to the Federal Circuit except Board decisions on the merits of both the discrimination and CSRA claims in mixed cases.

b. The only exception to the requirement that there be a final Board decision before any court may exercise judicial review is in Section 7702(e)(1)(B). Petitioner errs in relying (Br. 45-46) on that provision. Section 7702(e)(1)(B) specifies in relevant part:

> Nothwithstanding any other provision of law, if at any time after * * * the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee [with the EEOC,] * * * an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in [Title VII and the ADEA].

5 U.S.C. 7702(e)(1)(B). That provision is an exception to the final-decision prerequisite to judicial review; it is not an exception to the requirement that any final decision actually issued by the Board reach the discrimination issue in order to be subject to review in district court rather than the Federal Circuit.

Insofar as petitioner reads Section 7702(e)(1)(B) to allow filing suit in district court whenever 120 days have passed from the filing of an appeal with the Board if the Board has issued no "judicially reviewable action"—*i.e.*, even if the Board has dismissed the case on non-merits grounds—such a reading would defy common sense. Properly read, Section 7702(e)(1)(B) applies only to cases over which the Board continues to exert jurisdiction, not to cases in which the Board has already issued

a decision. The purpose of the provision is to save employees from being held in perpetual uncertainty by Board inaction. But that escape hatch serves no purpose when the MSPB *does* act by issuing a final decision, even if the decision does not reach the merits of the discrimination claim. Thus, although the Board has not issued a "judicially reviewable action" in petitioner's case and many more than 120 days have passed since she filed her appeal to the Board, Subsection (e)(1)(B) affords no basis for seeking review in district court in this case.[4]

Petitioner asserts (Br. 46) that an employee may file suit in district court under Section 7702(e)(1)(B) "at '*any*' time" if the MSPB does not act within 120 days of the filing of an appeal, even if the MSPB acts before such a suit is filed. In petitioner's view, an employee would therefore have the right under Section 7702(e)(1)(B) to file suit in district court several years after filing an appeal with the MSPB even if the Board had issued a final decision on the merits of the case on day 125. That cannot be correct. Section 7702(e)(1)(B)'s escape hatch applies only when the Board has not issued a final decision of any kind within 120 days after an appeal in a mixed case is filed and it ceases to apply when the Board issues a final decision, even if the Board does so after more than 120 days.

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[4] Applying Section 7702(e)(1)(B) to cases in which the Board has disposed of a case on non-merits grounds would lead to absurd results. Consider, for example, a situation in which an employee voluntarily dismisses his MSPB appeal after reaching a mutually agreeable resolution of his claims with his employing agency. The Board's order closing the case would not be a "judicially reviewable action" under Section 7702, and thus would not trigger district court jurisdiction under Section 7703(b)(2). But Congress would not have wanted to allow an employee to file suit in district court raising such claims anew 121 days—or five years—after the date she filed her MSPB appeal.

c. Petitioner argues that, if her case is not a "[c]ase[] of discrimination subject to the provisions of section 7702" under the exception to Federal Circuit jurisdiction in Section 7703(b)(2), then the 30-day limitations period set forth in Section 7703(b)(2) does not apply to her case. Pet. Br. 27 (first brackets in original). That is true, but it does not advance petitioner's argument. The essence of the question presented in this case is whether judicial review of the MSPB's decision in petitioner's case is governed by Section 7703(b)(1) or Section 7703(b)(2). In the government's view, it is governed by Section 7703(b)(1) because the Board's decision here was not a "judicially reviewable action" under Section 7702. There is therefore no reason why the 30-day limitations period set forth in Section 7703(b)(2), rather than the 60-day limitations period set forth in Section 7703(b)(1), would apply with respect to petitioner's seeking judicial review of the MSPB's decision.

Petitioner conflates separate stages of the administrative review process when she asserts (Br. 36) that the government "has repeatedly insisted that [her] claim is indeed controlled by the 30-day limitations period in section 7703(b)(2)," and insists that the government "cannot have it both ways." The 30-day limitations period in Section 7703(b)(2) would have applied if petitioner had sought judicial review of the agency's final decision on petitioner's mixed-case complaint rather than appealing to the MSPB. Section 7703(b)(2) governs district court review only of "judicially reviewable action[s]" of the Board, as such actions are defined in Section 7702. Section 7702(a)(2) makes clear that a final agency decision is a "judicially reviewable action" under Section 7702 by specifying that a "decision of the agency in [a mixed case] shall be a judicially reviewable action

unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2) (emphasis added). Petitioner was thus entitled under Section 7703(b)(2) to file suit in district court within 30 days of the agency's final decision. But she did not do so, instead opting to file an untimely appeal with the MSPB. Once she filed her MSPB appeal, the agency's final action was no longer a judicially reviewable action under the plain terms of Section 7702(a)(2), and therefore was no longer reviewable in district court under the exception in Section 7703(b)(2).[5]

There is therefore no merit to petitioner's argument (Br. 35) that, "[a]bsent the application of * * * section 7702(b)(2)" to MSPB decisions like the one in her case, "the applicable limitations period would vary" based on the particular type of discrimination alleged. The Federal Circuit is the only court that is authorized to review final MSPB decisions in mixed cases when such decisions are based on threshold procedural or jurisdictional grounds and do not reach the merits of the underlying discrimination issue. In all such cases, the 60-day limitations period in Section 7703(b)(1) applies. The limitations periods provided in statutes such as Title VII and the ADEA would not apply because judicial review of

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[5] Petitioner asserts (Br. 20) that she would have had to "forfeit her CSRA claim" if she had timely filed suit in district court following the agency's final decision. That is not correct. Section 7702(a)(2) specifies that a final agency decision in a mixed case is a "judicially reviewable action." Section 7703(b)(2) authorizes district court review of a "judicially reviewable action under * * * section 7702." Nothing in the CSRA indicates that the district court review authorized in Section 7703(b)(2) would preclude petitioner's raising her related CSRA and discrimination claims. See, *e.g.*, *Doyal* v. *Marsh*, 777 F.2d 1526, 1536-1537 (11th Cir. 1985) (noting that courts of appeals agree that district courts reviewing mixed cases should not bifurcate an employee's discrimination and nondiscrimination claims).

MSPB decisions is not available under such statutes. See pp. 44-46, *infra*. And in all cases in which the MSPB decides "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1), the 30-day limitations period in Section 7703(b)(2) applies. Indeed, Section 7703(b)(2) specifically provides that its 30-day limit applies to district court actions seeking review of judicially reviewable actions under Section 7702 "[n]otwithstanding any other provision of law."

4. This Court recently issued a decision in *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126 (2012), which presented the question "whether the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 2130. In the course of answering that question in the affirmative, the Court stated:

> In only one situation does the CSRA expressly exempt a covered employee's appeal of a covered action from Federal Circuit review based on the type of claim at issue. When a covered employee "alleges that a basis for the action was discrimination" prohibited by enumerated federal employment laws, 5 U.S.C. § 7702(a)(1)(B), the CSRA allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action as provided by the applicable employment law. See § 7703(b)(2). Each of the cross-referenced employment laws authorizes an action in federal district court. See 42 U.S.C. § 2000e–5(f); 29 U.S.C. § 633a(c); § 216(b).

Id. at 2134. The Court did not explain whether the reference in the second sentence to the "unfavorable MSPB decision" was intended to refer to an unfavorable MSPB

decision *on the issue of discrimination*. No party in *Elgin* had occasion to address—and this Court had no occasion to consider—that question because the employee in *Elgin* did not allege discrimination. For the reasons explained, the sole exception to the Federal Circuit's exclusive jurisdiction arises when the MSPB reaches the issue of discrimination. No such decision was rendered in this case.

B. Requiring Review In The Federal Circuit Of Non-Merits MSPB Decisions In Mixed Cases Is Consistent With Congress's Intent That There Be A Unified Body Of Law Governing MSPB Jurisdiction And Procedure

1. Construing the exception in Section 7703(b)(2) to apply only to cases in which the MSPB decides "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1), best serves the balance of interests Congress struck when it created the federal merit system. The two primary interests Congress sought to balance were (1) ensuring that the Federal Circuit would develop a uniform body of case law governing federal personnel issues and (2) protecting employees' right to have discrimination claims adjudicated de novo in district court. And Congress of course sought to conserve judicial resources where possible.

As this Court noted in *Fausto*, inherent in the "structure" of the CSRA is the "primacy of the United States Court of Appeals for the Federal Circuit for judicial review" of CSRA matters before the MSPB. 484 U.S. at 449 (citing 5 U.S.C. 7703). Channeling review of such matters to the Federal Circuit, the Court explained, "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an 'unnecessary layer

of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions.'" *Ibid.* (brackets in original) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 52 (1978)). Allowing "the district courts and the regional courts of appeals throughout the country" to review MSPB decisions would "undermin[e] the consistency of interpretation by the Federal Circuit envisioned by § 7703 of the Act." *Id.* at 451.

The basic rule set forth in Section 7703 thus ensures that one court—the Federal Circuit—will develop a uniform body of law governing federal personnel matters and the operation of the MSPB. Requiring Federal Circuit review of MSPB decisions that do not address the merits of a discrimination claim is consistent with that objective. Conversely, that objective would be disserved by having district courts and courts of appeals around the country review MSPB decisions that dispose of a case on threshold grounds such as timeliness or jurisdiction. Indeed, such a scheme could work to require the MSPB to apply different procedural or jurisdictional rules depending on which district court it anticipates would have jurisdiction to review its application of such rules. That is not what Congress intended.

The only exception to that structural principle protects employees' right to have agency decisions on discrimination claims subject to a de novo determination in district court. When the MSPB "decide[s] both the issue of discrimination and the appealable action" "under" Section 7702(a)(1), Congress authorized employees to seek review of such a decision by the EEOC and/or a district court. 5 U.S.C. 7702(a)(1) and (b), 7703(b)(2). But allowing district court review of MSPB decisions that do *not* reach discrimination issues would not further that interest. And requiring review in the Federal

Circuit of MSPB decisions that do not reach discrimination issues would not undermine employees' right to de novo district court review of discrimination claims because, in such cases, the Federal Circuit will not address any discrimination issue in deciding whether the MSPB properly disposed of a case on threshold procedural or jurisdictional grounds.

Here, the MSPB disposed of petitioner's appeal solely on the basis of its own regulations and case law; it did not apply or interpret any provisions of the federal antidiscrimination laws. J.A. 52-57. If the Federal Circuit were to reverse the MSPB's procedural determination, it would remand petitioner's case to the Board for a decision on "both the issue of discrimination and the appealable action" under Section 7702(a)(1). Such a decision by the MSPB on remand would qualify as a "judicially reviewable action" under Section 7702 and petitioner would at that point have the right under the exception in Section 7703(b)(2) to seek de novo review in the district court. That scheme—under which decisions on the merits of all mixed cases are reviewable in district court—protects employees alleging discrimination.

Congress's scheme also ensures, as much as possible, the development of a uniform body of case law governing the jurisdiction and functioning of the MSPB. It is true that certain discrimination claims filed in district court after a merits decision by the MSPB under Section 7702(a)(1) may involve questions of MSPB jurisdiction and procedure.[6] To that extent, Congress sought to pro-

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[6] Petitioner argues (Br. 44) that accepting the government's interpretation of Section 7703(b)(2) "would mean that different federal courts could have jurisdiction over the same procedural question, depending on whether that question was decided by the agency or the MSPB." District courts' jurisdiction to review final agency actions if an

tect employees' right to de novo determination of discrimination claims over ensuring absolute uniformity with respect to MSPB operations. But the Court should reject petitioner's invitation to expand Section 7703(b)(2)'s narrow exception to the general rule of exclusive jurisdiction in the Federal Circuit. Although that exception is important to protect employees' ability to obtain a de novo determination of discrimination claims, Congress did not intend that it encompass review of MSPB decisions that do not address any discrimination issue at all.

Petitioner relies (Br. 46-49) on portions of the CSRA's legislative history to argue that district courts should have jurisdiction "over all mixed cases." At best, however, that legislative history merely confirms that Congress intended district courts to have jurisdiction to review MSPB determinations in mixed cases when the Board decides the issue of discrimination. The two unenacted versions of the CSRA on which petitioner relies (*ibid.*) stated that review of MSPB decisions would be in the federal Court of Claims or a court of appeals, "except for actions filed in the United States district courts" under specified antidiscrimination statutes. See 2 *Legislative History of the Civil Service Reform Act of 1978*, Comm. Print, 96th Cong., 1st Sess. 1333, 1395 (1979). But neither bill specified which actions *could* be filed in district court. And the Senate report on which petitioner relies (Br. 48) simply expressed the view that district courts should have jurisdiction over discrimination claims, a view that is fully consistent with the government's interpretation of Sections 7702 and 7703.

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employee so chooses would not, however, undermine Congress's interest in having a uniform body of law apply to the MSPB's procedural and jurisdictional rules.

Under the CSRA, district courts are the only courts with jurisdiction to review or determine the merits of discrimination claims.

2. Petitioner is correct in suggesting (see Br. 7-10, 24) that the CSRA offers many administrative-review options to employees asserting mixed-case claims. When the agency issued a final decision on the merits of petitioner's discrimination claim, for example, petitioner had the option of either appealing to the MSPB within 30 days pursuant to 5 C.F.R. 1201.156 and 5 U.S.C. 7702(a)(2) or filing suit in district court within 30 days pursuant to Sections 7702(a)(2) and 7703(b)(2). If the Board had issued a final decision on the merits of her discrimination claim, petitioner would have had the option of either seeking review by the EEOC within 30 days pursuant to Section 7702(b)(1) or filing suit in district court within 30 days under Section 7703(b)(2). Perhaps the scheme would be simpler if Congress afforded an employee fewer options. But affording more options for review provides employees with a greater number of opportunities to obtain relief on their claims.

The advantage to employees is clear. Had petitioner filed a timely appeal with the MSPB, the Board would have decided her discrimination claim on the merits. If the Board had concluded that DOL did in fact discriminate against petitioner on the basis of sex or age, petitioner would have prevailed. The CSRA does not authorize the employing agency to seek review of a determination in favor of an employee on discrimination grounds in either the district court or the Federal Circuit. Section 7703 authorizes the Director of OPM to seek review in the Federal Circuit of a Board decision only if the Director determines that such decision reflects an "err[or] in interpreting a civil service law, rule, or regu-

lation affecting personnel management and * * * will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d). There is no provision for appeal by the government of discrimination issues decided in favor of an employee or applicant for employment.

If, in the alternative, the Board had concluded that DOL did not discriminate against petitioner, petitioner would have been able to seek de novo review of her discrimination claim in district court. Petitioner is therefore incorrect to suggest (Br. 61) that the government's position provides employees with a disincentive to appeal to the MSPB. Allowing an employee to appeal a final agency decision on a claim of discrimination to the MSPB in fact provides the employee with another bite at the apple—because it allows the employee to seek review of an agency decision without either incurring the expense of filing suit in district court or bearing the risk that the government will seek judicial review of a determination in favor of the employee on the discrimination claim.

The applicable provisions also establish various safeguards to protect employees from adverse consequences if they or their representatives are confused about which matters are appealable to the MSPB. First, Section 7702(f) provides that, whenever an employee "timely files [an] action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency." Thus, if an employee initiates a case by timely filing a mixed-case appeal with the MSPB, but it turns out that the personnel action at issue is not the type of action that is appealable

to the MSPB, her appeal will be treated as a timely initiation of a complaint with her employing agency.

Second, EEOC regulations give an employee a second chance to seek de novo review of her discrimination claim in district court when she timely files an appeal to the MSPB in a case over which the MSPB has no jurisdiction. The regulations provide that, "[i]f a person files a *timely* appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it *for jurisdictional reasons*, the agency shall reissue a notice" to the employee that she may request either a hearing with an EEOC administrative judge or "an immediate final decision" from the agency. 29 C.F.R. 1614.302(b) (emphases added); see 29 C.F.R. 1614.109(f). Because petitioner's appeal to the MSPB was untimely, she was ineligible for the protections of Section 7702(f) and the specified regulatory provisions.

Petitioner's interpretation of Section 7703(b)(2) would in fact tend to diminish an employee's incentive to comply with the rules governing the timing of MSPB appeals. In the government's view, if an employee desires further review of a final agency decision in a mixed case, she must either file a timely suit in district court or file a timely appeal with the MSPB. But under petitioner's interpretation of the CSRA, an employee who files neither a complaint nor a timely appeal could later resurrect a mixed case by filing an untimely appeal with the MSPB—even an appeal that is untimely by several years—and then seek district court review of the Board's order dismissing the appeal as untimely pursuant to Section 7703(b)(2). That cannot be what Congress intended when it created a narrow exception to the Federal Circuit's exclusive review of MSPB decisions.

II. PETITIONER CANNOT CIRCUMVENT THE FEDERAL CIRCUIT'S EXCLUSIVE JURISDICTION BY RETROACTIVELY WITHDRAWING HER ELECTION TO APPEAL HER CLAIMS TO THE MSPB

1. Petitioner now contends (Br. 37) that her complaint in this case was "not a request that the district court review the decision of the MSPB" and insists that she "seeks vindication only of [her] discrimination claims, and does not raise her CSRA claim." Although the question presented in the petition for a writ of certiorari is phrased broadly, both the petition and the government's brief in opposition make clear that the question at issue in this case is whether, *under the CSRA*, the district court has jurisdiction to review petitioner's discrimination claim, which the MSPB did not reach in its final decision. See, *e.g.*, Pet. 12-25 (discussing disagreement among courts of appeals about whether Section 7703 grants subject matter jurisdiction to review MSPB decisions on procedural or jurisdictional grounds); Gov't Br. in Opp. 13-16 (same). In her brief on the merits, petitioner appears to acknowledge (Br. 29 n.45), albeit in passing, that "a district court would only have jurisdiction over a Title VII or ADEA claim decided by the MSPB if that claim fell within the scope of the section 7703(b)(2) exception to section 7703(b)(1)."

As explained, petitioner's claim does not fall within the Section 7703(b)(2) exception. If petitioner now wishes to abandon her CSRA claim, including her reliance on Section 7703(b)(2) as a basis of the district court's jurisdiction, then her case is no longer a mixed case under Section 7702, and neither of Section 7703(b)'s jurisdictional provisions applies. The relevant questions for petitioner would then be whether her complaint was timely filed under Title VII and the ADEA and whether she

adequately exhausted her administrative remedies. But those are not the questions presented in her petition.

Moreover, petitioner's recent assertions (Br. 37-38) that she is not seeking review of the MSPB's decision contradict the manner in which she has litigated her case thus far. Petitioner alleged in her complaint that she had filed the complaint "within 30 days of the * * * final decision of the MSPB on [her] appeal" of the agency's decision, J.A. 64, and the district court held that it did not have jurisdiction to review the MSPB's decision, Pet. App. 9a-10a. In addition, petitioner argued in the court of appeals that her case could "be appealed from the MSPB to the district court" even though the MSPB had decided her "appeal entirely on procedural grounds and [had] not reach[ed] the merits of [her discrimination] claim." Pet'r C.A. Br. 11. Indeed, in her reply brief in the court of appeals, petitioner stated: "In spite of the convoluted facts of this case, the overriding issue is straightforward. Which court has jurisdiction over decisions of the MSPB in mixed cases, when those decisions are based on procedural grounds?" Pet'r C.A. Reply Br. 1; see *ibid.* ("If the [MSPB's] dismissal of [petitioner's] termination claim was properly before the Federal Circuit on record review, then the district court lacked subject matter jurisdiction and properly dismissed this action."). As the case came to this Court on petition for a writ of certiorari, therefore, it presented the question whether district courts have jurisdiction *under Section 7703(b)(2)* to review non-merits decisions of the MSPB in mixed cases, not whether the district court in this case had jurisdiction to consider petitioner's discrimination allegations directly under Title VII or the ADEA.

2. a. The CSRA provides federal employees with the right to seek de novo review in district court of discrimination claims at several points in the administrative process—*e.g.*, after a final decision by the employing agency, see 5 U.S.C. 7702(a)(2), 7703(b)(2); after a final MSPB decision on the merits of the claim, see 5 U.S.C. 7702(a)(1), 7703(b)(2); after review of an MSPB decision on the merits by the EEOC and subsequent reconsideration by the Board on remand from the EEOC, see 5 U.S.C. 7702(b)(5), 7703(b)(2); and after review by a special panel constituted to resolve disputes between the MSPB and the EEOC, see 5 U.S.C. 7702(d)(1) and (6), 7703(b)(2). See also 29 C.F.R. 1614.310 (EEOC regulation listing judicial review options in mixed cases). But if an employee elects at any of those points to opt for further administrative review (or no review within the relevant limitations period) rather than filing suit in district court, she cannot later pretend that she made a different choice, thereby resurrecting the previously eschewed option of seeking district court review of the earlier administrative decision.

Contrary to petitioner's assertion (Br. 57), the filing of an appeal with the MSPB does not "merely postpone[] the date on which an employee can file suit" seeking review of the agency's final decision. By the terms of Section 7702(a)(2), the filing of an appeal with the MSPB removes the agency's decision from the category of "judicially reviewable actions" that are subject to judicial review in either the Federal Circuit or a district court pursuant to Section 7703(b). See 5 U.S.C. 7702(a)(2) ("The decision of the agency in any such matter shall be a judicially reviewable action *unless the employee appeals the matter to the Board.*") (emphasis added). Once petitioner elected to appeal to the MSPB, the CSRA

both required her to exhaust that remedy before seeking judicial review and limited the availability of such review under the express statutory terms of Sections 7702 and 7703 as set forth above. Because petitioner elected to file an appeal with the Board, the district court no longer had jurisdiction under the CSRA over the agency's disposition of petitioner's discrimination claim.

The EEOC's regulations governing mixed cases also reflect the CSRA's election-of-remedies scheme. Those provisions explicitly state that an employee may seek review in district court of a mixed case "[w]ithin 30 days of receipt of a final decision issued by an agency on a complaint *unless an appeal is filed with the MSPB.*" 29 C.F.R. 1614.310(a) (emphasis added); see also 29 C.F.R. 1614.302(d)(1)(i) (noting that, if a mixed-case complaint becomes a judicially reviewable action pursuant to Section 7702(e)(1)(A) by virtue of the agency's failure to act on the complaint within 120 days, "the complainant may appeal the matter to the MSPB at any time thereafter * * * or may file a civil action * * * , *but not both.*") (emphasis added).

b. Consistent with applicable statutory and regulatory provisions, the agency's final decision advised petitioner that she could either appeal to the MSPB or file a civil action in district court within 30 days, but not both. J.A. 48-49. That notice accurately reflects the options for review generally provided under the CSRA to employees upon receiving an agency decision on the merits in a mixed case. See 5 U.S.C. 7702(a)(2); 29 C.F.R. 1614.302(d)(1)(ii). Here, however, petitioner was already on clear notice that her option to seek MSPB review of the agency's decision had been curtailed at her own request when the MSPB granted her motion to set a specific deadline for appeal, a deadline that had long

since expired when she received the agency's final decision. See J.A. 4-5. Petitioner nonetheless chose to appeal to the MSPB rather than filing a civil action in district court, although she was also on notice that doing so would preclude her from seeking district court review of the agency's decision under the CSRA. Having elected to appeal to the MSPB rather than file suit in district court, petitioner was required to exhaust her administrative remedies before seeking later judicial review.

The MSPB dismissed petitioner's appeal as untimely because of her own actions in pursuing her administrative remedies. Although petitioner initially filed an appeal with the MSPB in August 2006—while represented by counsel—she subsequently moved to dismiss her appeal without prejudice so that she could add her discrimination claim to her already pending EEO complaint. Pet. App. 3a. In her motion, petitioner specifically requested that her "'MSPB appeal be dismissed, without prejudice, *for a period of four months*, to allow the discovery phase of her EEOC appeal to proceed.'" *Id.* at 14a (emphasis added). On September 18, 2006, an MSPB administrative judge granted petitioner's motion, dismissing her appeal "without prejudice" to her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—*whichever occurs first.*" J.A. 5. The order further specified that "[t]his case will not be accepted for refiling after January 18, 2007." *Ibid.*

Petitioner, however, refiled her appeal on November 28, 2007, more than ten months after the deadline set by the MSPB at petitioner's request. See J.A. 64. Because petitioner did not refile her appeal within the specified time, the MSPB dismissed her appeal as untimely. If petitioner believed that the dismissal was in error, she

could have filed an appeal with the Federal Circuit. And, if the Federal Circuit had agreed with her, it would have remanded her case to the MSPB for a merits determination of her discrimination claims—a determination that would have been eligible for de novo review in district court pursuant to Section 7703(b)(2) had petitioner not prevailed.

3. Petitioner is also incorrect in arguing (Br. 42-44) that the government's interpretation of Sections 7702 and 7703 conflicts with the specific grant of jurisdiction to district courts provided in Title VII.[7] As noted, the question presented in this case is whether the district court had jurisdiction under the CSRA over petitioner's discrimination claim, not whether the district court had jurisdiction under Title VII. Thus, it is irrelevant to the resolution of this case whether petitioner could have filed suit directly under Title VII.

Title VII gives district courts jurisdiction over federal employees' discrimination claims, 42 U.S.C.

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[7] Although petitioner relies in her brief on the ADEA, she did not invoke the ADEA in her complaint. See J.A. 61-70. The ADEA provides federal employees with two avenues to reach district court. First, an employee may file suit if she notifies the EEOC of her intent to do so within 180 days after the alleged unlawful conduct and at least 30 days before filing suit. 29 U.S.C. 633a(c)-(d). Second, she may file suit in district court after first seeking relief from the EEOC. 29 U.S.C. 633a(b)-(c). The question whether such a complaint would be timely if filed at this point is not before the Court. In her complaint, petitioner also purported to rely on the Rehabilitation Act of 1973, J.A. 70, although she does not appear to be pursuing such a claim any longer. Because her claim of disability discrimination was not included in the appeal of her mixed-case complaint, the MSPB had no occasion to reach that claim. Thus, even under petitioner's view of the CSRA, the district court would not have jurisdiction under Section 7703(b)(2) over her claim of disability discrimination.

2000e-16(d) (incorporating 42 U.S.C. 2000e-5(f)(3)), and generally requires federal employees to file suit in district court within 90 days of, *inter alia*, the agency's final decision on the employee's complaint of discrimination, 42 U.S.C. 2000e-16(c). Title VII does not give district courts jurisdiction to review MSPB decisions in mixed cases. See *ibid.* Such jurisdiction is governed by the CSRA, which, for the reasons discussed, does not extend such jurisdiction to review of MSPB decisions that do not reach the merits of an employee's discrimination claims. When the MSPB does decide a discrimination issue, the CSRA permits the employee to seek de novo review of that decision in a district court, provided the employee files suit within 30 days, "[n]othwithstanding any other provision of law." 5 U.S.C. 7703(b)(2).

To the extent petitioner could have filed suit under Title VII raising solely her discrimination claim within 90 days of the agency's final decision on her EEO complaint pursuant to 42 U.S.C. 2000e-16(c), she did not do so. And insofar as petitioner might seek equitable tolling of the limitations period, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392-398 (1982) (Title VII limitations period is not jurisdictional), no tolling question is presented here. Instead, petitioner alleged in her complaint that she filed her complaint within 30 days of the MSPB's decision—a requirement she would have had to satisfy if the district court had jurisdiction to review that decision under Section 7703(b)(2)—and she relied below on the CSRA as the source of the district court's jurisdiction in litigating the dismissal of her case. J.A. 64; Pet'r C.A. Br. 11; Pet'r C.A. Reply Br. 1. Because the question presented in this case concerns district courts' jurisdiction under the CSRA, there is no

occasion for this Court to decide whether petitioner could have filed suit directly under Title VII after the MSPB dismissed her appeal as untimely.

4. Finally, there is no merit to petitioner's contention (Br. 38-42) that maintaining exclusive Federal Circuit review of MSPB procedural and jurisdictional decisions "would in certain circumstances conflict with the express statutory guaranties of a trial de novo" in federal antidiscrimination statutes and with this Court's holding in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that federal employees filing suit under Title VII are entitled to a de novo determination of factual questions. As petitioner acknowledges (Br. 39), "[i]n discrimination cases, factual disputes will most often concern the merits of the underlying claims." Because the Federal Circuit has no jurisdiction to review discrimination claims, that court would have no occasion to review factual disputes going to the merits of such claims.

Petitioner argues (Br. 39) that "disputes can also arise with regard to procedural or jurisdictional issues." But in a case such as petitioner's, the only facts the Board considered were facts relevant to whether the MSPB itself had jurisdiction. Federal employees do not have a right to a de novo determination of such facts in district court under Title VII or any other law. If the Board had dismissed petitioner's claim on other procedural or jurisdictional grounds—*e.g.*, because the underlying employment action is not appealable to the Board or because petitioner failed to prosecute a timely filed appeal—those decisions also would not have determined any facts related to her discrimination claim. The only specific example petitioner offers in support of her argument is a hypothetical case in which a federal employee could be denied a de novo determination of facts related

to whether she initiated her administrative complaint process by contacting an EEO counselor within 45 days of the effective date of the relevant employment action or of the employee's notice of such action. Pet. Br. 39-41 (citing 29 C.F.R. 1614.105(a)). But if an employing agency issues a final decision in a mixed case that determines that an employee did not initiate her complaint process in a timely fashion, the employee is entitled to seek de novo district court review of that determination at that point.

Under the EEOC's regulations, the employing agency may waive noncompliance with the 45-day initiation rule, 29 C.F.R. 1614.105(a)(2), and nothing in either the CSRA or the MSPB's regulations would permit the MSPB to override such a waiver if the employee appealed an adverse agency decision to the Board. On the contrary, the Board has stated that it defers to an agency's determination of whether an EEO complaint was timely filed. See *Cloutier* v. *USPS*, 89 M.S.P.R. 411, 414 (2001). Although the Board may make factual findings about whether the agency or the EEOC has already made a timeliness determination in a particular case, it should not make its own factual findings about the timeliness of a complaint filed with the agency or an appeal filed with the EEOC. See *Moore* v. *USPS*, 91 M.S.P.R. 277, 280-281 (2002) ("[A]n [MSPB] administrative judge may not dismiss an appeal as untimely filed under [29 C.F.R.] 1201.154 based on the untimeliness of the [employee's] formal EEO complaint absent evidence of either a final agency decision dismissing the EEO complaint as untimely that was not appealed to the EEOC, or a decision by the EEOC dismissing the complaint as untimely ").

Here, the only issue the Board decided was whether petitioner had complied with the deadline she requested for filing an appeal with the MSPB. Resolution of that question does not touch on any issue of discrimination and is not, therefore, a judicially reviewable action under Section 7702. Any judicial review of that decision must be in the Federal Circuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Relevant Provisions of the Civil Service Reform Act

1. 5 U.S.C. 7701 provides:

Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available,

subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision

would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1)

of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances

during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

2. 5 U.S.C. 7702 provides:

Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with re-

spect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the

Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with

an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

3. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after

the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such

petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Relevant Provisions of Title VII of the Civil Rights Act of 1964

42 U.S.C. 2000e-16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) **Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress**

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publish-

ing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e–5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for de-

lay in payment shall be available as in cases involving nonpublic parties..[1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e–5(e)(3) of this title applicable to compensation discrimination

Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

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[1] So in original.

REPLY BRIEF

No. 11-184

RECORD
AND
BRIEFS

In The
Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. THE QUESTION PRESENTED IS WHETHER THE CSRA REPEALED THE SUBJECT MATTER JURISDICTION THAT DISTRICT COURTS HAD PRIOR TO 1978

District court jurisdiction over the discrimination claims of federal workers is created by three statutes enacted prior to the CSRA, not by the CSRA itself. Section 1331 of 28 U.S.C. provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the ... laws ... of the United States." A claim that federal officials violated Title VII or the ADEA easily fits within the terms of section 1331. Section 1343(a)(4) provides that

> [t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ... [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights....

Section 706(f)(3) of Title VII states that "[e]ach United States district court ... shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); section 706(f)(3) is a "jurisdiction-granting section." *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1244 (2010).[1] Each of these provisions provides subject matter jurisdiction over a statutory

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[1] Section 717(d) of Title VII provides, with regard to Title VII claims by federal workers, that "[t]he provisions of section 706(f) ... shall govern civil actions brought hereunder." 42 U.S.C. § 2000e-16(d).

employment discrimination claim, or in the case of section 706(f)(3) a claim asserting discrimination in violation of Title VII, unless the CSRA repealed those pre-existing jurisdictional grants. (Pet'r Br. 29 n.45).

The Secretary insists that the actual question presented by this case is limited to whether the CSRA itself "grant[s],"[2] "give[s],"[3] "extend[s],"[4] or is the "source"[5] and "basis"[6] of district court subject matter jurisdiction, at least in cases in which a plaintiff had sought review in the MSPB. The Secretary suggests that this Court should decide only whether the CSRA creates district court jurisdiction over mixed cases such as Kloeckner's, and ought to leave for another day the issue of whether the CSRA has repealed the pre-existing subject matter jurisdiction of district courts. (R.Br. 17-18, 39, 44-46).

But the CSRA itself does not *grant* to district courts subject matter jurisdiction over any cases at all, even over the mixed-case discrimination actions that the government readily acknowledges could – indeed, could only – be heard in district court. Neither section 7702 nor section 7703 of 5 U.S.C. contains any mention of district courts or uses the term "jurisdiction." The only court mentioned in either provision

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[2] R.Br. 15, 25, 26, 39.

[3] R.Br. 18.

[4] R.Br. 45.

[5] R.Br. 45.

[6] R.Br. 39.

is the Court of Appeals for the Federal Circuit. There is a dispute as to whether the CSRA affects the jurisdiction of the district courts, but only because the CSRA, in conjunction with the Federal Courts Improvement Act, *limits* district court jurisdiction. Jurisdiction over mixed cases is "governed by the CSRA" (R.Br. 45) in the sense that the existence of jurisdiction turns on whether the CSRA repealed the jurisdictional grants in sections 1331, 1343(a)(4) and 706(f)(3), but that is quite different from the Secretary's assertion that the CSRA created jurisdiction over those cases.

Section 1295(a)(9) of 28 U.S.C. provides that the Federal Circuit has "exclusive jurisdiction" over appeals from "final order[s] or final decision[s] of the [MSPB], pursuant to section [ ]7703(b)(1) ... of title 5." Section 7703(b)(1) thus limits the reach of section 1295(a)(9), because the latter applies only to appeals "pursuant to" section 7703(b)(1). Section 7703(b)(1) in turn is limited by section 7703(b)(2); section 7703(b)(1) applies "[e]xcept as provided in [section 7703(b)(2).]" Thus the cases that section 7703(b)(2) states are to be "filed under" the listed employment statutes – in district court – are ipso facto outside the scope of section 7703(b)(1), and thus outside the exclusive jurisdiction of the Federal Circuit under section 1295(a)(9). The section 7703(b)(2) provision that mixed cases shall be "filed under" specified employment statutes preserves that district court jurisdiction because "[e]ach of the cross-referenced employment laws authorizes an action in federal

district court." *Elgin v. Dep't of the Treasury*, 132 S.Ct. 2126, 2134 (2012).

The Secretary asserts that Kloeckner "relied below on the CSRA as the source of the district court's jurisdiction." (R.Br. 45). That is incorrect. The Secretary's brief cites page 64 of the Joint Appendix, which sets forth part of the original complaint. But the portion of the complaint at page 64 is simply the procedural history of the case. The "Jurisdiction" section of the complaint is actually on page 62 of the Joint Appendix; it asserts that the district court "has jurisdiction under 28 U.S.C. § 1331 ... , under 28 U.S.C. § 1343(a)(4) ... and under 42 U.S.C. § 2000e-5(f)(3)," and does not state that jurisdiction is created by the CSRA. The Secretary also cites page 11 of Kloeckner's brief in the court of appeals, but this page merely summarizes the holding of the district court. The "Jurisdictional Statement" in that brief states that "[t]he district court had original jurisdiction over this civil action, pursuant to 28 U.S.C. § 1331," and because "Title VII ... provide[s] a right to challenge discrimination in federal employment by way of a civil action in a United States District Court." (Pet'r C.A. Br. 1).

The Secretary asserts that "Title VII ... do[es] not give district courts jurisdiction to review MSPB decisions." (R.Br. 18; see *id.* at 30-31, 45). The existence of subject matter jurisdiction under section 706(f)(3), however, does not turn on whether a claim was appealed to the MSPB. The terms of section 706(f)(3) provide subject matter jurisdiction over any

action "brought under [Title VII]." That requirement is assuredly met here. The complaint included nine specific references to Title VII,[7] and it is Title VII that contains the prohibition against gender-based discrimination which petitioner seeks to enforce. The grant of jurisdiction in section 706(f)(3) is not affected by whether or not a plaintiff pursued an appeal to the MSPB or by how the Board resolved any such appeal.

II. NEITHER THE CSRA NOR THE FEDERAL COURTS IMPROVEMENT ACT REPEALED THE DISTRICT COURTS' JURISDICTION OVER MIXED CASES

A. The First Sentence of Section 7703(b)(2) Expressly Protects District Court Jurisdiction Over Mixed Cases

In holding that district courts lack jurisdiction over mixed cases such as Kloeckner's, the court of appeals below relied on the first sentence of section 7703(b)(2). (Pet. App. 5a-9a). That sentence, which delineates the cases that fall outside the Federal Circuit's exclusive jurisdiction, provides that "[c]ases of discrimination subject to the provisions of section 7702 of this title shall [instead] be filed under [Title VII and the ADEA]." The Eighth Circuit reasoned, following the Federal Circuit in *Ballentine v. MSPB*, 738 F.2d 1244, 1246-47 (Fed. Cir. 1984), that if the MSPB has not reached the merits of a mixed case

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[7] E.g., J.App. 61, 65, 66, 69-70.

appeal, a subsequent lawsuit does not present a "case[ ] of discrimination." (Pet. App. 6a).

In our opening brief we argued that all mixed cases in which the complainant alleged a violation of Title VII or the ADEA are "cases of discrimination subject to the provisions of section 7702," and thus within the scope of this first sentence of section 7703(b)(2), regardless of the basis on which the MSPB decided an appeal. (Pet'r Br. 30-36). In *Elgin v. Dep't of the Treasury*, this Court recently observed that the first sentence of section 7703(b)(2) indeed applies to all cases in which a claimant alleges discrimination violating one of the referenced statutes.

> When a covered employee "alleges that a basis for the action was discrimination" prohibited by enumerated federal employment laws, 5 U.S.C. § 7702(a)(1)(B), the CSRA allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action as provided by the applicable employment law ... [e]ach of [which] authorizes an action in federal district court.

132 S.Ct. at 2134.

The Secretary does not argue that "cases of discrimination" in section 7703(b)(2) excludes some mixed cases. To the contrary, the Secretary now agrees that

> [a] case qualifies as a "[c]ase[ ] of discrimination subject to the provisions of section 7702" when an employee has both "been affected by an action which [she] may appeal" to the MSPB *and* "alleges that a basis for the action was discrimination" prohibited under a federal antidiscrimination statute such as Title VII. 5 U.S.C. 7702(a)(1)(A)-(B).

(R.Br. 21 (emphasis and alterations in original); see *id.* at 15, 26). The first sentence of section 7703(b)(2) clearly preserves district court subject matter jurisdiction over mixed cases.

B. The Existence of A "Judicially Reviewable Action" Is Not A Jurisdictional Requirement

The Secretary asserts that the second sentence of section 7703(b)(2) limits the subject matter jurisdiction of the district courts. That sentence provides that "[n]otwithstanding any other provision of law, any such case filed under any such section [of the relevant anti-discrimination statute] must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702." This sentence, the Secretary contends, means that in the absence of a "judicially reviewable action" a lawsuit would be excluded from the scope of the first sentence of section 7703(b)(2), and thus (by operation of section 7703(b)(1) and 1295(a)(9)) would fall within the

exclusive jurisdiction of the Federal Circuit. (R.Br. 7, 15, 20, 26).

The second sentence of section 7703(b)(2), however, is not jurisdictional; it clearly does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006); see *Stern v. Marshall*, 131 S.Ct. 2594, 2607 (2011) ("[W]e are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such."). That sentence does not address *where* an action may be filed (i.e., in district court or in the Federal Circuit), but instead concerns *when* an action must be commenced. The operative requirement is about timing: "within 30 days." The second sentence of section 7703(b)(2) thus is not a reference to or a repeal of subject matter jurisdiction; rather, it is a statute of limitations. See *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*); *Kontrick v. Ryan*, 540 U.S. 443 (2004). "Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' ... Filing deadlines ... are quintessential claim-processing rules." *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011). The 30-day filing rule itself is not jurisdictional; it manifestly lacks the requisite "clear" (or, indeed, any) indication of congressional intent to impose a jurisdictional requirement. *Id.*; see *Arbaugh*, 546 U.S. at 515-16. If the 30-day filing rule itself is not jurisdictional, surely the mere inclusion of a reference to a judicially reviewable action could not be jurisdictional either.

The fact that this case falls within the pre-CSRA jurisdictional grants in sections 1331, 1343(a)(4) and 706(f)(3) weighs heavily against the Secretary's contention, because it would require this Court to conclude that the second sentence in section 7703(b)(2) had repealed by mere implication those three pre-existing jurisdictional provisions. For more than a century this Court has refused to permit such express jurisdictional provisions to be repealed by implication.

> When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.

Rosencrans v. United States, 165 U.S. 257, 262 (1897). "Repeals by implication are not favored, and the general grant of jurisdiction to the district courts ... should not in any case be transferred exclusively to the circuit courts by words of doubtful import." *Lees v. United States*, 150 U.S. 476, 479 (1893); see *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

There are, to be sure, circumstances in which the existence of a judicially reviewable action is a prerequisite to an action in district court, but not because of

section 7703(b)(2) and not for want of subject matter jurisdiction. Section 7702 delineates six different decisions at various levels of the administrative process that constitute a judicially reviewable action.[8] Section 7702(e) delineates three circumstances in which a complainant can sue if a judicially reviewable action has not occurred within 120 or 180 days after a specified event.[9] Read together these provisions establish the exhaustion requirement governing a mixed case: a plaintiff can file suit only if either one of the judicially reviewable actions has occurred or one of the 120- or 180-day waiting periods has elapsed. Thus, in certain circumstances – e.g., if a complainant has filed an appeal to the MSPB and the applicable waiting period has not yet elapsed[10] – the complainant may not bring suit unless the MSPB has taken a judicially reviewable action. But this is an exhaustion requirement, not a jurisdictional rule.

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[8] 5 U.S.C. §§ 7702(a)(2) (action by the employing agency), 7702(a)(3) (action by the MSPB; determination by the EEOC not to consider a decision by the MSPB), 7702(b)(5)(A) (decision by the EEOC to concur in the decision of the MSPB), 7702(c) (decision by the MSPB to adopt the decision of the EEOC), 7702(d)(2)(A) (decision by the special panel).

[9] 5 U.S.C. §§ 7702(e)(1)(A) (120 days following the filing of a complaint with the employing agency), 7702(e)(1)(B) (120 days following the filing of an appeal to the MSPB), 7702(e)(1)(C) (180 days following the filing of a petition with the EEOC to review a decision of the MSPB).

[10] The lower courts are divided regarding whether a claimant who has filed an appeal with the MSPB can withdraw that appeal and instead file suit in district court, assuming that he or she does so within the limitations period governing such suits.

C. A Final MSPB Decision Is A Judicially Reviewable Action Regardless of The Basis of That Decision

A "judicially reviewable action" by the MSPB is not limited to MSPB decisions that resolve the merits of an appeal. Section 7702(a)(3) provides that "[*a*]*ny* decision of the Board under [section 7702(a)(1)] shall be a judicially reviewable action." (Emphasis added). Section 7702(a)(1) in turn provides that a decision of the Board shall be "in accordance with the Board's appellate procedures." Thus clearly a decision "under" section 7702(a)(1) could resolve a case on procedural grounds rather than on the merits. If Congress had wanted to limit the section 7702(a)(3) definition of "judicially reviewable action" to decisions of the Board "on the merits," it could have done so expressly; just such a limitation is found in sections 7703(a)(2) and 3330b(b)(2) of 5 U.S.C.[11]

The Secretary argues that an MSPB final decision based on procedural or jurisdictional considerations is not a "judicially reviewable action" within the meaning of the CSRA. But interpreting "judicially reviewable action" to exclude any category of final MSPB decisions would render unworkable the CSRA statute of limitations regarding mixed cases. Section 7702(e)(1)(B) authorizes a complainant to file suit "if

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[11] 5 U.S.C. § 3330b(b)(2) ("after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits....").

at any time after ... the 120th day following the filing of an appeal with the Board ... there is no judicially reviewable action." Thus if an MSPB decision based on procedural or jurisdictional grounds were not a judicially reviewable action, section 7702(e)(1) would authorize the filing of a civil action even after the MSPB had decided a case on such grounds. And if, as the Secretary contends, a procedure- or jurisdiction-based MSPB decision is not a judicially reviewable action, the 30-day limitations period in section 7703(b)(2) also would not apply, because that limitations period runs from "notice of the judicially reviewable action." As a result, under the Secretary's interpretation of "judicially reviewable action," if the MSPB were to decide a case on procedural grounds, a complainant would have forever to file suit under section 7702(e)(1)(B).

The Secretary recognizes that this would be an "absurd result[ ]." (R.Br. 28 n.4). The solution to the problem created by her interpretation of "judicially reviewable action," the Secretary argues, is to construe section 7702(e)(1)(B) to authorize suit only if "the Board has not issued a final decision *of any kind*." (*Id.* at 28 (emphasis added)). But section 7702(e)(1)(B) by its express terms authorizes suit in the absence of a "judicially reviewable action," not in the absence of "a final decision of any kind." If the phrase "judicially reviewable action" in section 7702(e)(1)(B) *means* "a final decision of any kind," it surely has the same meaning in section 7703(b)(2) and throughout the CSRA.

The Secretary contends that a procedure- or jurisdiction-based MSPB decision is not a "decision ... under [section 7702(a)(1)]" because section 7702(a)(1) requires the MSPB within 120 days of the filing of an appeal to "decide both the issue of discrimination and the appealable action." The Secretary suggests that the phrases "the issue of discrimination" and "the issue of ... the appealable action" both refer only to the merits of those claims. (R.Br. 21-22). On the Secretary's view, section 7702(a)(1) thus requires the MSPB to address and resolve in every case the merits of both the discrimination and the adverse action claims, regardless of whether, for example, the Board's procedural regulations require dismissal of the claims or the Board lacks jurisdiction over them.

It would be quite extraordinary for Congress to direct any tribunal to decide the merits of an appeal without regard to procedural or jurisdictional defects; the terms of section 7702(a)(1) assuredly do not require, or indeed permit, such a peculiar interpretation. Section 7702(a)(1)'s direction that decisions be "in accordance with the Board's appellate procedures" clearly envisions that the Board would not violate section 7702(a)(1) if, because of those procedures, it did not reach the merits of a claim. In the instant case the Department of Labor expressly urged the MSPB to dismiss Kloeckner's claim without resolving it on the merits; the Solicitor General appears to contend that the course of action successfully advocated by the Department violated section 7702(a)(1)'s requirement of a merits decision in every case, and that by persuading the MSPB to violate section 7702(a)(1)

the Department managed to strip plaintiff of her right to proceed in district court. That cannot be correct.

The Secretary's rule that an MSPB decision in a mixed case would not be a "judicially reviewable action" unless the Board decided on the merits both the discrimination claim and the adverse action claim[12] would lead to nonsensical consequences. For example, suppose the MSPB decided the discrimination claim on the merits, holding that discrimination had not occurred, but rejected the adverse action claim on procedural grounds, such as because the complainant had failed to preserve the adverse action claim by addressing it in her brief to the Board. On the Secretary's view the MSPB decision in such a case would not be a judicially reviewable action, because there would be no merits decision on the adverse action claim, and the complainant thus could not file suit in district court; but the complainant would also be barred from seeking relief in the Federal Circuit, which cannot consider a dispute about the merits of a discrimination claim.

The Secretary insists that the reference in section 7703(a)(2) to certain MSPB decisions "on the merits" demonstrates that "judicially reviewable action" in section 7703(b)(2) – which contains no such reference – must mean a decision on the merits.

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[12] In an adverse action appeal under section 7701(c) the MSPB is to consider the five distinct grounds set out in sections 7701(c)(1) and 7701(c)(2) for overturning that action.

(R.Br. 24). It is clear, however, that section 7703(a)(2) applies only to the identity of the proper respondent in a case in which a claimant seeks direct review in the Federal Circuit, and not to the identity of the appropriate defendant in a lawsuit filed in district court.[13] Moreover, the reference in section 7703(a)(2) on which the Secretary relies was only added to the statute in 1989,[14] and cannot have altered the meaning

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[13] Section 7703(a)(2) expressly applies only to a proceeding brought "pursuant to this subsection." Subsection 7703(a) concerns direct appellate review, not lawsuits filed in district court.

Under section 7703 as originally enacted, direct appellate review of a CSRA decision occurred under chapter 158 of Title 28, which was incorporated by reference in section 7703(b)(1). Under chapter 158, review is sought by filing a "petition to review," and the party seeking judicial review is denoted the "petitioner"; section 7703 itself uses those same terms regarding direct appellate review. It is for that reason that section 7703(a)(2) specifies the method of naming the "respondent," the term for a party replying to a petition, rather than the identity of the proper "defendant," the party against whom an action is brought in district court. Because a petition for "judicial review" under section 7703(a) is different than a "[c]ase[ ] of discrimination" under section 7703(b)(2), section 7703 establishes a different limitations period for a "petition for review" (60 days) and for a "case filed under [a specified anti-discrimination statute]" (30 days). Compare 5 U.S.C. § 7703(b)(1) with *id.* § 7703(b)(2).

[14] Whistleblower Protection Act of 1989, Pub.L.No. 101-12, § 12, 103 Stat. 16, 35. Prior to 1989 section 7703(a)(2) read as follows:

> The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks

(Continued on following page)

of the phrase "judicially reviewable action" as adopted in 1978.

Although the grounds on which the EEOC under section 7702(b)(3)(B) can disagree with a decision of the MSPB are limited, that limitation does not create any restriction on the subject matter jurisdiction of federal courts or even on the jurisdiction of the EEOC itself. Section 7702(b)(1) permits a complainant to petition the EEOC to consider any decision of the MSPB; petitions are not limited to merits decisions or judicially reviewable actions. Of course, the EEOC would not ordinarily agree to consider an MSPB decision unless the Commission concluded that the decision involved the interpretation or application of one of the listed anti-discrimination statutes. But the substantive standard of review that the EEOC would apply in dealing with the merits of a petition, or in exercising its discretion to hear a petition, sheds no light on the respective jurisdiction of district courts and of the Federal Circuit. As the Secretary acknowledges, for example, a district court (unlike the EEOC) could provide relief in a case that an agency had erroneously dismissed on procedural grounds. (R.Br. 34-35 n.6.)

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review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

92 Stat. 1111, 1143.

D. District Court Jurisdiction Over Mixed Cases Was Not Repealed by The Federal Courts Improvement Act of 1982

The Secretary relies heavily on the fact that today under section 7703(b)(1) direct appellate review of MSPB decisions is limited to the Federal Circuit. (R.Br. 32-36). In framing section 7703(b)(2), the Secretary contends, "Congress permitted only a narrow exception to the exclusivity of the Federal Circuit's judicial review of MSPB decisions." (*Id.* at 15). If all mixed cases could be filed in district courts, the Secretary warns, "courts of appeals around the country [would] review MSPB decisions ... on threshold grounds such as timeliness or jurisdiction" (*id.* at 33), leading to "geographic variance in the interpretation of [MSPB procedural] rules." (*Id.* at 18). "Nothing in the CSRA mandates such an impractical system, and petitioner offers no reason why Congress could have desired it." (*Id.* at 19).

In fact, however, the "impractical system" to which the Secretary objects is precisely the structure that Congress chose in 1978 when it enacted the CSRA. In 1978 the Federal Circuit did not yet exist. Under the original terms of the CSRA claimants seeking direct appellate review of a final MSPB decision in a non-discrimination case could do so by filing a petition for review in any of the geographical

courts of appeals.[15] Thus at the time section 7703(b)(2) was adopted, Congress clearly intended that under section 7703(b)(1) direct appellate review of MSPB decisions would indeed occur in circuit courts throughout the country. It emphatically is not the case, as the Secretary asserts, that "when [Congress in 1978] *created* the federal merit system" one of the "primary interests Congress sought [was] ... ensuring that the Federal Circuit would develop a uniform body of case law governing federal personnel issues." (R.Br. 32 (emphasis added)). Section 7703(b)(2) could not have been framed as "a narrow exception to the exclusivity of the Federal Circuit's judicial review of MSPB decisions" (*id.* at 15), because when section 7703(b)(2) was enacted the Federal Circuit did not exist. Because the Congress that enacted section 7703(b)(2) did not intend to concentrate appellate litigation in one circuit, Congress could not have contemplated that section 7703(b)(2) would be construed to advance any such purpose. Under section 7703(b)(2) as originally adopted district courts clearly retained their jurisdiction over any mixed case action under the listed federal employment statutes.

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[15] Section 7703(b)(1) originally provided that "a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively of title 28." (92 Stat. 1143). Under 28 U.S.C. § 2343, venue in a chapter 158 proceeding existed in the judicial circuit where the petitioner resided.

It was not until the Federal Courts Improvement Act of 1982 that Congress created the Federal Circuit and amended section 7703(b)(1) to transfer direct appellate review of MSPB decisions in non-discrimination cases from the geographical circuits to the Federal Circuit. See Pub.L.No. 97-164, §§ 127, 144, 96 Stat. 15, 37-38, 45. In doing so, however, Congress did not alter in any way the language of section 7703(b)(2). Congress's 1982 decision to amend the CSRA in favor of promoting uniformity in the judicial resolution of non-mixed cases does not change "what the words of [section 7703(b)(2)] must fairly be understood to mean." *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002). The Federal Courts Improvement Act assuredly did not repeal by implication the district court jurisdiction that the CSRA in 1978 had expressly preserved.

E. The Applicable MSPB and EEOC Regulations Support The Conclusion That The CSRA Does Not Repeal District Court Jurisdiction Over Mixed Cases

As we noted in our opening brief, the regulations of both the MSPB and the EEOC construe section 7703(b)(2) to apply to all mixed cases. (Pet'r Br. 50-52). Those regulations represent the considered and longstanding view of the agencies responsible for administering the CSRA and the federal administrative process for resolving discrimination complaints. In *Ballentine v. MSPB*, 738 F.2d 1244 (Fed. Cir. 1984), the MSPB opposed the narrow interpretation

of section 7703(b)(2) advanced in this Court by the Secretary. (See Pet'r Reply, 9-10).[16] The consistent MSPB and EEOC interpretation of section 7703(b)(2) is entitled to weight. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1335 (2011).

The Secretary asserts that the MSPB regulations merely provide that "employees *generally* have the right to seek judicial review in district court" (*id.* at 22 (emphasis added); see *id.* 23 n.4), as if those regulations stated that the right to judicial review in district court exists in only some limited category of mixed cases. To the contrary, the regulations are emphatically all inclusive. Section 1201.157 of 5 C.F.R. applies to "[*a*]*ny* final decision of the Board," and section 1201.175(a) provides that "the appropriate United States district court is authorized to conduct *all* judicial review of cases decided under 5 U.S.C. 7702." (Emphases added).

Although the issues raised by this case have important implications for the activities of the MSPB and the EEOC and for the meaning and validity of their regulations, the general counsels of those independent agencies have chosen not to sign the brief of respondent. Petitioner, however, maintains that the

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[16] See http://www.mspb.gov/appeals/appellantqanda.htm (Question 25) (visited August 6, 2012) and http://www.mspb.gov/appeals/htm (Judicial Review) (visited August 6, 2012).

MSPB and EEOC regulations are indeed correct and mean what they say.

F. Respondent Fails To Articulate A Clear Standard Regarding When District Courts Do Not Have Jurisdiction Over Mixed Cases

This Court has repeatedly recognized the importance of clarity in the legal standards that govern the subject matter jurisdiction of federal courts. Plaintiffs need "clear guidance about the proper forum for the employee's claims at the outset of the case." *Elgin,* 132 S.Ct. at 2136. The need for clarity is particularly acute in this case because of the exceptionally short period of time within which an employee must both select the court in which to proceed and draft and file the required pleading. Under section 7703(b)(2) a case of discrimination must be filed in district court within 30 days after receipt of the notice of the reviewable action. Clarity is also essential for federal employees who proceed pro se when seeking judicial relief following an adverse MSPB decision.

Long experience with the standard in *Ballentine* has demonstrated that the legal regime it established has been "a mine field for the unwary." *Afifi v. United States Dep't of the Interior*, 924 F.2d 61, 62 (4th Cir. 1991). The distinction in *Ballentine* and its progeny between Federal Circuit and district court jurisdiction over mixed cases "is hazy at best and incoherent at worst." *Elgin*, 132 S.Ct. at 2135. The Federal

Circuit has struggled to find some intelligible method of explaining the *Ballentine* standard to pro se litigants. (Pet'r Cert. Reply 3-5).

The Secretary's brief proposes a variety of different standards for determining whether, in light of the basis of an MSPB decision, the Federal Circuit or a district court would have jurisdiction:

> "*Threshold procedural grounds.*"[17] Under this standard district courts would have jurisdiction over *non*-threshold procedural issues that arise after an MSPB appeal is under consideration. See *Hopkins v. MSPB*, 725 F.2d 1358 (Fed. Cir. 1984) (jurisdiction to hear challenge to rejection of counsel fee request as untimely).
>
> "*Procedural or jurisdictional questions.*"[18] All procedural and jurisdictional issues would be within the exclusive jurisdiction of the Federal Circuit, even if, for example, "the jurisdictional question is intertwined with the discrimination claim." *Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir. 1998) (sustaining government position that Federal Circuit has jurisdiction over such a case); see *id.* at 1263 n.2 (noting conflict on the issue) (concurring opinion); *Hill v. Dep't of the Air Force*, 796 F.2d 1469, 1472-73 (Fed. Cir. 1986) (concurring opinion) (applying *McDonnell Douglas Corp.*

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[17] R.Br. ii, 19.

[18] R.Br. 16, 32, 34 n.6.

v. Green, 411 U.S. 792 (1973) and numerous ADEA cases in determining whether MSPB had jurisdiction).

"*Touch[ing] on discrimination,*"[19] "*related to the merits*" or "*determin[ing] any facts related to ... discrimination.*"[20] Under this standard, procedural or jurisdictional disputes would be within the jurisdiction of the district court, not the Federal Circuit, if they involved some construction or application of the prohibitions in the underlying employment statute.[21]

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[19] R.Br. 25 n.3, 48.

[20] R.Br. 46.

[21] In *Powell v. Department of Defense*, 158 F.3d 597 (D.C.Cir. 1998), the government successfully argued that the Federal Circuit has jurisdiction over "Board decisions based on procedural or threshold matters that *are* related to the merits." *Id.* at 599 (emphasis in original).

The MSPB has held that a removal is within the scope of its jurisdiction if an employee is subjected to sufficient harassment that his or her resulting resignation was "involuntary." The resolution of that jurisdictional question usually requires the MSPB to decide whether particular alleged acts of harassment actually occurred and in some instances whether instances of proven but facially neutral harassment were motivated by a discriminatory animus. See A. Cummings, "The Mixed-Case Dilemma in Federal Sector Employment Appeals," 2008 APR Army Law. 17, 17, 20-21 (2008).

> "*Until the merits ... are reached.*"[22] If the MSPB finds that discrimination had occurred, disputes about subsequently arising procedural issues would be within the jurisdiction of the district court.
>
> "*Decid[ed] ... the merits of both the discrimination and CSRA claims.*"[23] Under this standard the Federal Circuit would have exclusive jurisdiction over a case in which the MSPB decided the merits of the discrimination claim but did not reach the merits of the CSRA adverse action claim.

The differences among these standards are rooted in the lack of any textual basis for the Secretary's proposed limitation on district court jurisdiction.

Even if a single standard were selected, the courts would have to resolve recurring questions about the meaning of that rule. The Secretary, for example, suggests that a key criterion may be whether or not the basis of the MSPB decision was "procedural"; that resembles the distinction between procedural and substantive law that has vexed the lower courts since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Courts have struggled with questions about what issues fall within the scope of the "merits" of a case under the *Ballentine* standard.[24] Under

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[22] R.Br. 14; see *id.* at 15, 16, 19, 26, 27, 32-36.

[23] R.Br. 27; see *id.* at 22, 32, 33, 34.

[24] See *McCarthy v. Vilsack*, 322 F.App'x 456, 458-59 (7th Cir. 2009) (jurisdiction over case in which MSPB held plaintiff had

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several of the Secretary's proposed standards it is unclear which court would have subject matter jurisdiction if a plaintiff (whose individual discrimination claim had been decided on the merits) sought to overturn an MSPB decision refusing to certify a class, if a claim was rejected based on res judicata, or if a claimant was seeking to enforce a settlement agreement. A single appeal to the MSPB could involve more than one claim; in this case Kloeckner's appeal raised three different claims. If the Board were to reject one claim on procedural grounds and another on the merits, it is unclear under the Secretary's standard which court would have jurisdiction, or whether the claims would have to be divided and heard in separate proceedings, one in the Federal Circuit and one in district court.[25] In an appeal involving only a single claim, the MSPB might reject that

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not established a non-frivolous claims of discrimination); *Franklin v. U.S. Postal Serv.*, 61 F.App'x 686, 687 (Fed. Cir. 2003) (jurisdiction over whether settlement resolving discrimination claim was involuntary); *Powell*, 158 F.3d at 597 (same); *Brumley v. Levinson*, 1993 WL 128507 at *1 (8th Cir. April 27, 1993) (jurisdiction over case in which MSPB rejected discrimination claim on ground that plaintiff had not proven recovery from prior disability); *Kean v. Stone*, 926 F.2d 276, 282-85 (3d Cir. 1991) (jurisdiction over dispute about amount of counsel fee award); *Hill v. Dep't of the Air Force*, 796 F.2d 1469 (Fed. Cir. 1986) (jurisdiction over case in which MSPB held plaintiffs had not established a non-frivolous discrimination claim).

[25] See *Donahue v. U.S. Postal Serv.*, 2006 WL 859448 (E.D.Pa. Mar. 31, 2006) (MSPB rejected one discrimination claim on the merits, one discrimination claim based on res judicata, and one discrimination claim as frivolous).

claim both on procedural grounds and on the merits, or the three members of the Board might in separate opinions give different types of reasons for rejecting that claim.

Interpreting the CSRA to leave unaffected district court jurisdiction over *all* mixed cases assures that litigants and courts alike will easily understand which court has jurisdiction over such claims.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

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